IN THE

Supreme Court of the United States

No. 77-1335

INTERSTATE PROPERTIES and I.P. CONSTRUCTION CORP.,
Petitioners,

vs.

GARY BECKER,
Respondent,

INTERSTATE CONSTRUCTION CORP., WINDSOR CONTRACTING CORP., LAWRENCE CORP., DIAMOND REO, JAMESWAY COMPANY, WILLARD EDWARDS, A.I.A. RAYMOND KEYES ENGINEERS, and SAUL SILVERMAN,
Defendants,

WOOD PINE CONSTRUCTORS, INC.,
Third Party Defendant.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

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Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Interstate Properties and I.P. Construction Corp., respectfully pray that a writ of certiorari issue to review the judgment of a divided United States Court of Appeals for the Third Circuit reversing and remanding the Judgment of the United States District Court for the District of New Jersey.

OPINIONS BELOW

Neither the opinion of the United States District Court for the District of New Jersey nor the opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in any reporters, official or unofficial. The opinions and orders of those courts are reproduced in the Appendix as follows: District Court Opinion, Appendix A (Pa1-Pa15), District Court Judgment, Appendix B (Pa16-Pa17), Circuit Court of Appeals Opinion, Appendix C (Pa18-Pa43), and Circuit Court of Appeals Judgment, Appendix D (Pa44-Pa45).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit (Docket No. 76-2520) was entered on December 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the two member majority of the Third Circuit Court of Appeals utilized an erroneous standard of review in conflict with all the other Circuit Courts and failed to give proper deference to the contrary views of the District Court Judge and dissenting Circuit Court Judge, both of whom are long-standing members of the New Jersey bar, on an issue of New Jersey law?

2. Whether the ruling of a divided Circuit Court of Appeals on an issue of New Jersey law is clearly erroneous where the Circuit Court is the only court in the United States which has reached its conclusion and where all of the judges in this case who are members of the New Jersey bar reached a contrary conclusion?

STATUTES INVOLVED

The statutes involved in this case are set forth verbatim in the appendix as follows:

(1) Appendix E: Workmens' Compensation Statutes, *N.J.S.A.* 34:15-8, *N.J.S.A.* 34:15-40 and *N.J.S.A.* 34:15-79 (Pa46-Pa51); (2) Appendix F: Construction Safety Act, *N.J.S.A.* 34:5-168, *N.J.S.A.* 34:5-177 (Pa52); (3) Appendix G: Worker Health and Safety Act, *N.J.S.A.* 34:6A-17 and *N.J.S.A.* 34:6A-22 (Pa53); (4) Appendix H: Worker Health and Safety Code (*N.J.A.C.* 12:110-2.1) and Construction Safety Code (Table of Contents and *N.J.A.C.* 12:180-2.1, *N.J.A.C.* 12:180-2.1.17, *N.J.A.C.* 12:180-3.1, *N.J.A.C.* 12:180-3.8, and *N.J.A.C.* 12:180-3.9) (Pa54-Pa67), and (5) Appendix I: Motor Vehicle Financial Responsibility Law, L. 1958, c. 95, § 6 (The Sessions Laws are included instead of *N.J.S.A.* 39:6-46 because only the Session Law sets forth the applicable amounts of insurance coverage at the time of the accident. See Historical Note following *N.J.S.A.* 39:6-46.) (Pa68-Pa69).

STATEMENT OF THE CASE

This controversy arises out of a construction site accident in which plaintiff, Gary Becker, an employee of an independent subcontractor (Wood Pine Constructors, Inc., hereinafter "subcontractor" or "Wood Pine") was injured by the truck owned and operated by a sub-subcontractor (Windsor Contracting Company, hereinafter "sub-subcontractor" or "Windsor"). Petitioners (I.P. Construction Company and Interstate Properties) are the general contractor and owner-developer, respectively. Plaintiff filed suit on March 26, 1974 in the federal district court of New Jersey based upon diversity of citizenship of the parties 28 U.S.C. § 1332.

Plaintiff filed his Complaint and Amended Complaint against several defendants, namely, William Edwards (tortfeasor), Windsor Contracting Company (Edward's employer), Raymond Keyes (a consultant engineer retained by Interstate), Saul Silverman (architect-employee of I.P. Construction Company, the Contractor-Developer) and Interstate Properties (Owner-Developer) (3rd Pa1, 3rd Pa 25).[1] Petitioners filed a third party complaint against Wood Pine alleging that Wood Pine was responsible to indemnify Interstate and/or I.P. Construction in the event that any liability was found in favor of plaintiff against Interstate or I.P. Construction (3rd Pa40). Plaintiff did not file suit against his employer, Wood Pine, presumably because under New Jersey law his exclusive remedy against an employer is under the workmen's compensation statutes.

Prior to the accident in question, the subcontractor (Wood Pine) executed an agreement with the general

1. 3rd Pa references are to the plaintiff's appendix, which is part of the record before the Third Circuit Court of Appeals.

contractor (I.P. Construction) which required the subcontractor to perform the paving work for a shopping area in East Windsor, New Jersey (3rd Pa457-3rd Pa 465). The subcontract explicitly provided that Wood Pine was an independent contractor (3rd Da53).[2] The agreement also provided that Wood Pine would furnish certain types of insurance, namely, comprehensive general liability insurance, workmen's compensation and Employer's liability insurance, and automobile liability and property damage insurance (3rd Da56-3rd Da57).

I.P. Construction relied on its agreement with Wood Pine as to the types and amount of insurance coverage and the certificate of insurance supplied by Wood Pine (3rd Pa264, 3rd Pa360, 3rd Pa374, 3rd Pa463). Plaintiff made no allegation that Wood Pine did not carry the required insurance, particularly workmen's compensation insurance. In fact, Wood Pine had workmen's compensation insurance to cover plaintiff as mandated by New Jersey law.

The subcontractor, Wood Pine, orally agreed with its sub-subcontractor, Windsor, that Windsor would haul paving material from Trap Rock Industries, a supplier, to the parking lot (3rd Pa332). I.P. Construction did not necessarily know that Wood Pine would hire a sub-subcontractor, but in any event did not check on the insurance status of Windsor (the sub-subcontractor) because that was Wood Pine's responsibility under the contract and Windsor was a minimal portion of the operation (3rd Pa229, 3rd Pa240-3rd Pa 241, 3rd Pa361-3rd Pa362, 3rd Pa364, 3rd Pa395, 3rd Pa408-3rd Pa409, 3rd Pa434). At the time of the accident, Windsor had automobile liability insurance in the amount of $10,000.00 which complied with New Jersey statutory requirements at that time *N.J.S.A.* 39:6-46. See Appendix I, Pa68-Pa69. On August 31, 1972 plaintiff

2. 3rd Da references are to defendants' (Petitioners') appendix filed in the Third Circuit Court of Appeals.

was injured by Windsor's truck driven by Windsor's employee.

On April 19, 1976 petitioners filed a motion for summary judgment against plaintiff and on May 13, 1976 plaintiff cross-moved for summary judgment. On September 17, 1976 the Honorable Clarkson S. Fischer, with 27 years of experience as a New Jersey attorney and jurist, granted petitioners' motion, denied plaintiff's motion, and entered judgment for petitioners on September 27, 1976 (Pa16-Pa17). The District Judge rejected all of plaintiff's claims against petitioners, namely: (1) That petitioners retained control over the manner and means of doing the work; (2) That the activity (paving work) constituted a nuisance *per se;* (3) That plaintiff was a third party beneficiary of the contract between petitioners and Wood Pine; and (4) That petitioners owed a duty to plaintiff to insure that the sub-subcontractor carried "adequate" automobile liability insurance even though plaintiff was covered by workmen's compensation insurance.

On October 12, 1976 plaintiff appealed the District Court judgment to the Third Circuit Court of Appeals. On December 21, 1977 a divided Third Circuit Court of Appeals reversed the District Court's decision only on the fourth issue, namely, that petitioners were liable for the torts committed by the sub-subcontractor solely because the sub-subcontractor carried "inadequate" automobile liability insurance even though plaintiff was covered by workmen's compensation insurance.[3]

The sole basis of the majority's decision was a line of cases and law review articles concerning "distributive justice" for *uncompensated* plaintiffs in tort suits. The ma-

3. Because the majority reversed the District Court solely on the issue of "adequate" automobile liability insurance, the factual background regarding the other issues has been omitted as irrelevant.

jority rejected as not controlling explicit legislation in New Jersey which imposes the responsibility on owners to insure that employees have workmen's compensation benefits but imposes no such responsibility on owners with regard to liability insurance. The majority also rejected out-of-state cases as "unpersuasive," including the federal decisions, all of which hold that *uncompensated* employees cannot bring suit against the owner where a general contractor had failed to carry mandated workmen's compensation insurance. Neither member of the majority is a member of the New Jersey bar.

The Honorable James Hunter III, with 38 years of experience as a New Jersey attorney and jurist, dissented from the majority's holding on this issue (Pa39-Pa43).

This petition is submitted in support of petitioners' contention that the majority utilized an erroneous standard of review of the district court's decision, failed to give proper deference to the two New Jersey jurists who reached a contrary decision on an issue of New Jersey law, and reached a clearly erroneous interpretation of New Jersey tort law.

REASONS FOR GRANTING WRIT

Introduction

Petitioners readily concede that this Court does not normally review circuit court decisions regarding issues of State law in diversity cases. *Pierson v. Ray*, 386 U.S. 547, 558 (footnote 12) (1967). However, petitioners seek not only a reversal of a clearly erroneous decision regarding State law by a divided Third Circuit Court of Appeals, but also the first ruling by this Court regarding the proper standard for review by the circuit courts concerning decisions of the district courts on issues of State law and the proper deference which circuit court members (who are members of the bar of other states) should give to the reasoned decisions of their brethren who are members of the bar of the local State. This Court has not rendered any decisions on these points in the forty years since this Court decided *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

In fact, this case is particularly appropriate to resolve these questions because the majority's standards for reviewing district court decisions on questions of State law are at variance with the standards enunciated by all the other circuit courts. In addition, the majority reached its decision in this case in spite of the fact that both the District Judge and dissenting Circuit Judge, both of whom are long-standing and the only members of the New Jersey bar involved in this case, reached a conclusion contrary to that of the two-person majority.

Point I

The divided Third Circuit Court of Appeals committed plain error in its interpretation of New Jersey Tort Law because it misconceived New Jersey Law and now is the only Court in the United States to adopt such a tort standard.[4]

The Supreme Court Rules explicitly provide that this Court will review decisions of the circuit courts when they decide important questions of State law in conflict with applicable State law or depart from accepted standards in judicial proceedings. Supreme Court Rule 19(1)(b). Concededly, this Court overrules decisions of lower federal courts on issues of State law only upon a showing that the conclusions are unreasonable. *Bishop v. Wood*, 426 U.S. 341, 346 (footnote 10) (1976). That is precisely the case here.

The issue before the District Court and Third Circuit Court of Appeals was whether the property owner and general contractor are liable under New Jersey law to a plaintiff-employee of a subcontractor (who is fully covered by workmen's compensation insurance) for the tort committed by an independent sub-subcontractor solely because the automobile liability insurance coverage carried by the latter was "inadequate" in amount.

The majority recognized that there were no New Jersey cases squarely on point, and based its decision upon a patently erroneous view of State law flowing from

4. The legal arguments regarding the applicable State tort law are presented first to provide an orderly presentation of this petition. However, as noted in the Questions Presented for Review, petitioners believe the most important issues, from this Court's perspective, are those concerning the applicable standard for review of district court decisions concerning issues of State law and the proper deference to give to the opinions of the judges from the local bar, Point II, *infra*.

an "incidental comment" made by retired Justice Francis in *Majestic Realty Associates Inc. v. Toti Contracting Co.*, 30 N.J. 425, 153 A.2d 321 (1959). In *Majestic Realty, supra*, the New Jersey Supreme Court dealt with the age-old problem of the liability of a property owner to third parties for torts committed by an independent general contractor.

The District Court properly determined, and plaintiff conceded below, that the long standing law of New Jersey is:

> ". . . where a person engages a contractor, who conducts an independent business by means of his own employees, to do work not in itself a nuisance (as our cases put it), he is not liable for the negligent acts of the contractor in the performance of the contract." *Majestic Realty, supra* at 431; *Csaranko v. Robilt, Inc.*, 93 N.J. Super. 428, 433, 226 A.2d 43 (App. Div. 1967) (Pa2-Pa3).

The rationale behind this rule is that one person should not be compelled to answer for the fault of another over whom he has no control and an employer should be entitled to rely on a contractor to discharge his legal duties to others.

Three exceptions to this rule have been recognized, namely:

> "(a) where the landowner retains control of the manner and means of the doing of the work which is the subject of the contract; (b) where he engages an incompetent contractor; or (c) where . . . the activity contracted for constitutes a nuisance *per se*." *Ibid* (Pa3).

Plaintiff asserted below that the exception concerning incompetency includes cases in which a sub-subcontractor does not have "adequate" automobile liability insurance.

However, in *Majestic Realty, supra*, Justice Francis explicitly recognized that the incompetency exception had been limited ". . . to considerations of skill and experience . . ." of the contractor. *Id.* at 432. In what he himself described as "incidental comment," he said ". . . *perhaps* much can be said for the view that a loss arising out of the tortious conduct of a financially irresponsible contractor should fall on the contractee." *Ibid.* He also stated that "Research has not disclosed a case where the proposal has been applied." The court explicitly refused to rule on the issue because it arose only at oral argument and was unnecessary for the resolution of the case.

Most importantly, the court in *Majestic Realty* was dealing with an *uncompensated* third party[5] who sustained damages off the premises, not an employee of a sub-subcontractor who is covered under the workmen's compensation statutes. The majority acknowledged that *Majestic* dealt with such plaintiffs:

> ". . . we are called upon to evaluate the effect of a dictum by the New Jersey Supreme Court that failure to insist on a financially-responsible independent contractor will subject the employer of that contractor to liability to *uncompensated* victims for the contractor's negligence." (Emphasis added) (Pa19).

Preliminarily, it should be emphasized that the majority inaccurately characterized the dictum of the court, *i.e.* failure to hire a financially-responsible contractor *will subject* the employer to liability. As noted above, the court *explicitly* did not rule on this issue. Even though the New Jersey courts have not decided whether totally uncompensated third parties may recover solely because the independent contractor did not have adequate liability insurance, the majority held that employees covered by workmen's compensation insurance can hold the owner liable solely because a sub-subcontractor failed to carry "adequate" automobile liability insurance. In reaching that conclusion, the majority had to consider "all the available data" that the New Jersey courts might consider. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940).

The majority considered legislation enacted in New Jersey after *Majestic* (which legislation the majority found not controlling), out-of-state cases, all of which rejected the doctrine suggested in *Majestic* (which cases the majority also found unpersuasive) and supposedly pertinent state cases and some law review commentaries concerning *Majestic* which are generally based on situations wherein the plaintiff, as in *Majestic*, was an *uncompensated* third party.

The dissenting circuit judge, himself a member of the New Jersey bar for 38 years, placed great reliance on New Jersey's legislative enactments in rejecting plaintiff's claim (Pa39-Pa43). The workmen's compensation law specifically holds an owner or general contractor responsible if a subcontractor does not carry mandated workmen's compensation insurance. *N.J.S.A.* 34:15-79 (see Appendix E, Pa50-Pa51). However, after the court's decision in *Majestic Realty*, New Jersey enacted comprehensive and complementary statutes dealing with worker's health and safety, namely, the Construction Safety Act, *N.J.S.A.* 34:4-166 *et seq.*, and Worker Health and Safety Act, *N.J.S.A.* 34:6A-1 *et seq.* (see Appendices F and G, respectively, Pa52 and Pa53). Pursuant to these statutes, the New Jersey Department of Labor and Industry promulgated an exhaustive series of codes on this subject matter. (see Ap-

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5. Third party is a person not involved with the project itself i.e. not an employee at the job site. See footnote 7, p. 15, *infra*.

pendix H, Pa54-Pa67). Significantly, neither the acts nor the codes impute liability or require liability insurance in any amount on the owner or general contractor of a construction project.[6]

Given the Legislature's considered determination to impose responsibility on the owner for workmen's compensation benefits and its refusal to impose any liability insurance requirement in a later and complementary statute on worker's health and safety demonstrates clear legislative intent not to impose such responsibility on the general contractor and/or owner in this case. *Keenan v. Essex Co. Bd. of Chosen Freeholders*, 101 N.J. Super. 495, 507, 244 A.2d 703 (Law Div. 1968), *aff'd* 106 N.J. Super. 312, 255 A.2d 786 (App. Div. 1969); *Craster v. Bd. of Commissioners, Newark*, 9 N.J. 225, 330, 87 A.2d 721 (1952). The dissenting Circuit Judge agreed with this analysis (Pa39-Pa41).

The majority opinion rejected, as "unpersuasive", the out-of-state cases, all of which hold that the owner is not liable for injuries to employees where the independent general contractor fails to carry mandated workmen's compensation insurance or does not carry liability insurance to cover third parties *Goodwin v. U.S.*, 517 F.2d 481 (9th Cir. 1975) (no liability for failure to enforce workmen's compensation insurance requirement in the contract); *Reid v. U.S.*, 421 F. Supp. 1244 (E.D. Cal. 1976) (same); *Hampton v. McCord*, 141 Ga. App. 97, 232 S.E.2d 582 (Ga. Ct. of App. Div. 3, 1977) (no liability for failure to require liability insurance of contractor); *Coleman v. Silverberg Plumbing*, 263 Ca. App.2d 74, 60 Cal. Rptr. 158 (Cal. Ct. of App. 2nd Dist. 1968) (no liability for failure to insure compliance by contractor with statutory obligation of obtaining workmen's compensation insurance); *Matanuska*

6. As noted earlier, the automobile liability insurance carrier by Windsor complied with New Jersey's statutory requirements. *N.J.S.A.* 39:6-46. See Appendix I (Pa68-Pa69).

Elec. Assn. v. Johnson, 386 P.2d 698 (Alas. Sup. Ct. 1963) (same). The majority's decision is particularly stunning since the federal courts have rejected claims against the owner by employees not covered by any insurance, whereas here plaintiff seeks recovery of liability insurance in addition to the workmen's compensation insurance.

Being unpersuaded either by New Jersey case law or by New Jersey statutes or cases directly on point from other jurisdictions, the majority instead based its decision on some law review comments concerning *Majestic* and supposedly analogous State cases discussing risk distribution. However, all those comments and cases generally dealt with plaintiffs who were otherwise uncompensated. In fact, the law review commentaries cited by the majority explicitly distinguished between injuries to third parties versus injuries to employees covered by workmen's compensation insurance.[7] In short, the majority's reliance on the "incidental comment" in *Majestic* and its supposedly analogous cases and comments totally ignores the crucial fact that here we are not dealing with an uncompensated plaintiff. In this light, the authority provided by those cases and comments is *de minimis* for a plaintiff covered by workmen's compensation insurance.

A brief illustration demonstrates the unsoundness of the majority's decision. Under New Jersey law, an em-

7. Calabresi, *Some Thoughts on Risk Distribution and the Law of Tort* 70 *Yale L.J.* 499, 543 ("Respondeat superior applies it to injuries to third parties, while workmen's compensation applies it to the worker himself"); Harper & James 2 *The Law of Torts* 1404 (1956) ("The distinction between independent contractor and employee or servant is made in many other connections today besides in determining the employer's vicarious liability to third persons. It is, for instance, made the test for application of workmen's compensation"); Note, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule* 40 *U. Chicago L. Rev.* 661, 673 (1973) (the analysis must be considered in the context of the following comment: ". . . the courts are confronted with a choice between letting the injured party go *uncompensated* or fixing liability on the employer who directly authorized the commission of the injury," Emphasis added).

ployee injured at the job site by his employer (whether negligent or not) may proc ed only under workmen's compensation insurance *N.J.S.A.* 34:15-8 (see Appendix E, Pa46). Thus, had plaintiff been injured by a truck owned and operated by his own employer, his sole remedy would have been under the workmen's compensation statutes. However, because by chance the plaintiff here was injured by the truck of a sub-subcontractor, the majority has held that he can recover not only under workmen's compensation insurance, but also from petitioners because the sub-subcontractor failed to carry "adequate" automobile liability insurance.[8]

The majority has usurped the New Jersey Legislature's function and apparently decided that the Legislative mandate in New Jersey for workmen's compensation coverage is inadequate for employees on the job site. Since no court in the United States has taken the majority's position for *uncompensated* employee plaintiffs, it is a clear abuse of the majority's duty to apply State law to reach the conclusion it did for this plaintiff-employee who has workmen's compensation insurance coverage.

The Ninth Circuit aptly summarized, in a case less compelling than here, the conclusion which should have been reached in this case:

> "For this reason alone, plaintiff's appeal must fail, for plaintiff does not argue that the district court judge misapplied the existing law because there is none. Rather, he contends that there is a discernible trend in Alaska law toward "the broadest consumer protection" (Brief for Appellant at 9). He argues that this is "the perfect case for an extension of warranty protection to a limited class of consumers" (Brief for Appellant at 18). We would prefer to allow the Alaska legislature or the Alaska Supreme Court to make that extension." *Smith v. Sturm, Ruger & Co., Inc.* 524 F.2d 776, 778 (9th Cir. 1975).

8. Under New Jersey law an employee can bring a common-law tort action for the negligence of tortfeasors other than his employer *Schweizer v. Flox Division of Colt Industries*, 70 N.J. 280, 287, 359 A.2d 857 (1976). The workmen's compensation insurance carrier is entitled to plaintiff's recovery from the other tortfeasors up to the amount paid by the carrier. *Ibid*, *N.J.S.A.* 34:15-40(b) and (c) (see Appendix E, Pa47).

Petitioners respectfully request that this court grant certiorari to review the Circuit Court decision under either Supreme Court Rule 19(1)(b) or as part of its overall disposition of the issues raised in Point II, *infra*. *Riverbank Laboratories v. Hardwood Products Corp.*, 350 U.S. 1003 (1956) (*per curiam* decision reversing Court of Appeals on State law question and upholding District Court decision).

Point II

The Third Circuit Court of Appeals used an erroneous standard in reviewing the District Court's decision and failed to give proper weight to the opinions of the District Judge and dissenting Circuit Judge, both of whom are long-standing members of the New Jersey Bar, on an issue of New Jersey Law.

The task of the federal courts sitting in diversity and deciding questions of State law is not an easy one.[9] Yet the Erie doctrine has compelled the lower federal courts to decide, as if it were a State court, important questions of State law. With the $10,000 jurisdictional limit in diversity cases increasingly unimportant because of inflation, the activities of the federal courts in this area will neces-

9. See Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins* 55 *Yale Law Journal* 267, 290 (1964); Kurland, *Mr. Justice Frankfurter, The Supreme Court and The Erie Doctrine in Diversity Cases*, 67 *Yale Law Journal* 197, 212 (1957).

sarily increase. As noted in Point I, *supra*, the majority in this case reached a clearly erroneous interpretation of State law based upon a misconception of the basis for an "incidental comment" in an inapposite tort case, a refusal to follow the clear pronouncements and trends of New Jersey legislation, a refusal to follow all the out-of-state cases which related to *uncompensated* employee plaintiffs, and adherence to law review commentaries and other cases concerning a "nascent legal rule" regarding uncompensated plaintiffs when the plaintiff here is fully covered by mandated workmen's compensation insurance. It is submitted that had the two member majority utilized the proper standard of review of district court decisions concerning State law issues and given proper deference to the views of the district judge and dissenting circuit judge, both of whom are long-standing members of the New Jersey bar, petitioners would not need to seek review before this Court. These standards of review are of critical importance to diversity suit litigants because, as a practical matter, the circuit courts are the final appellate review.

The Third Circuit apparently is the only judicial circuit which undertakes an independent review of district court decisions on issues of State law. In *William B. Tanner, Inc. v. WIOO, Inc.*, 528 F.2d 262 (3rd Cir. 1975), the Third Circuit, in a diversity case involving questions of Pennsylvania law, independently reviewed the legal conclusions of the district judge and reversed portions of his findings.

> "Here, too we may independently review the district court's finding as a mixed question of fact and law.
>
> • • •
>
> Since WIOO challenges only the application of the facts to the law, we may exercise an independent review of the district court's determination." 528 F.2d 268.

Similarly, in the instant case, although the majority paid lip service to the expertise of the trial judge, it proceeded to reach its own conclusion regarding the applicable New Jersey law ". . . since his analysis rested solely on general policy and out-of-state cases . . ." (Footnote 8, Pa20).[10] The majority did not give any weight to the fact that its dissenting brother, himself a member of the New Jersey bar for 38 years, differed with their analysis and concurred with the District Judge.

Although the majority reached a clearly erroneous conclusion, it conceded that the issue of State law was a close one. Its opinion stated:

> "The task of a federal court sitting in diversity is frequently not an easy one, for it must foresake its realm of expertise and assume the aspect of a court of the forum state. Even when applying well-settled law, the federal tribunal must be alert to nuances of precedent. Where, as here, a federal court is asked to pass on the implication of a declaration by a state high court of a new principle in an evolving area of the law, it must act with even greater sensitivity.
>
> . . . This endeavor is a perplexing one, but it is not one this court is free to avoid. In the course of discharging our obligation, we must choose either to reject or to accept a nascent legal rule, and thus risk distorting state law as much by an excess of conservatism as by insufficient attention to *stare decisis*" (Pa19).

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10. The statement that the District Court rested its views solely on general policy and out-of-state cases is misleading, if not inaccurate. The District Court based its decision on an analysis of the impact of the incidental comment in *Majestic*, New Jersey legislation and cases cited by plaintiff in support of its "risk distribution" theory, and the fact that no other court in the United States ever applied the Majestic *dictum* to uncompensated employees, let alone one covered by workmen's compensation insurance.

Clearly, from a review of the majority's decision in this case and the analysis of that decision in Point I, *supra*, the majority followed its holding in *Tanner*, *supra*, and simply substituted its judgment for that of the district court. No other circuit purports to conduct such an independent review of district court decisions on questions of State law, although the standards used in the Second Circuit are not clear. Compare *Lomaritira v. American Automobile Insur. Co.*, 371 F.2d 550, 554 (2d Cir. 1967) ("clearly wrong") with the dissent in *Ziman v. Employers Fire Insur. Co.*, 493 F.2d 196, 201 (2nd Cir. 1974) (majority substituted its opinion for that of district court).

The standards utilized by the Ninth and Tenth Circuits are that where there are no State decisions on point, the views of the resident district judge carry "extraordinary persuasive force" and are set aside only if "clearly erroneous". *Neu v. Grant*, 548 F.2d 281, 287 (10th Cir. 1977); *U.S. v. Pollard*, 524 F.2d 808, 810 (9th Cir. 1975); *Smith v. Sturm, Ruger & Co., Inc.*, 524 F.2d 776 (9th Cir. 1975) (compelling weight if no State decision on point). Indeed, at one time both the Sixth and Eighth Circuits also held that they would reverse the district court only if his conclusion was "impermissible" under State law *Village of Brooten v. Cudahy Packing Company*, 291 F.2d 284, 288 (8th Cir. 1961); *Lee Shops, Inc. v. Schatten-Cypress Co.*, 350 F.2d 12, 17 (6th Cir. 1965) *cert. den.* 382 U.S. 980 (1966).

However, at the present time the Fourth, Fifth, Sixth, Seventh and Eighth Circuits have all adopted a standard of giving "great deference" to the views of the trial judge, and affirm their decisions except in limited circumstances. *Wren v. New York Life Insur. Co.* 493 F.2d 839, 841 (5th Cir. 1974) ("great weight"); *Lucas v. Firestone Tire and Rubber Company* 458 F.2d 495, 496-7 (5th Cir. 1972) ("considerable stock" where State law unsettled); *Filley v. Kick-*

off Publishing Company, 454 F.2d 1288 (6th Cir. 1972) ("considerable weight"); *Buehler Corporation v. Home Insur. Co.*, 495 F.2d 1211 (7th Cir. 1974) ("great weight" where no controlling State precedent); *Ideal Plumbing Co. v. Benco Inc.*, 529 F.2d 972 (8th Cir. 1976) ("great deference"); *Williams v. Weyerhaueser Company*, 378 F.2d 7 (4th Cir. 1967) (defer to trial court); see also *Luke v. American Family Mutual Insurance Company*, 476 F.2d 1015, 1019 (1973) *cert den.* 414 U.S. 856 (1973) (especially footnote 6) for that court's discussion of the standards for review.

This does not mean that the circuit courts in those circuits blindly accept the district court's findings, but rather that they tend to defer to the district court where there is no State precedent and reverse only when the district court clearly misapplies existing State law, fails to give proper deference to old cases or goes against the clear line of authorities in other states when there is no State precedent *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176 (5th Cir. 1971) (District Court applied minority view and was "clearly erroneous" 450 F.2d 1181. The Circuit Court also noted minor factual inaccuracies in the decision—see footnote 3); *Hood v. Dun & Bradstreet*, 486 F.2d 25 (5th Cir. 1973) *cert den.* 415 U.S. 985 (1974) (District Court failed to give proper deference to two old, unreversed Georgia cases); *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485 (4th Cir. 1973) (statute clear on its face); *Randolph v. New England Mutual Life Ins. Co.*, 526 F.2d 1383 (6th Cir. 1975) (District Court not in accord with "better reasoned line of cases"); *Northwestern National Insur. Co. v. Corley*, 503 F.2d 224 (7th Cir. 1974) (District Court decision in conflict with a substantial line of Illinois cases); *Permian Corp. v. Armco Steel Corp.*, 508 F.2d 68 (10th Cir. 1975) (District Court erroneously based decision on federal common law, not

State law). Of course, none of those exceptional considerations justify reversal of the district court in this case. There is no clear New Jersey case law on point, and New Jersey legislation and the out-of-state cases all support the conclusion of the District Judge and dissenting Circuit Judge.

Because this Court has not enunciated the proper standards for review by the circuit courts in the forty years since *Erie*, the standards now range from "clearly erroneous" to an "independent review." Clearly the latter standard is undesirable. Although the commentators have criticized those courts which regard district courts findings as conclusive, they also recognize the salient policy considerations in deferring to the local trial judge:

> "As a general proposition, a federal court judge who sits in a particular state and has practiced before its courts may be better able to resolve complex questions as to the law of that state than is some other federal judge who has no such personal acquaintance with the law of the State." 1 Barron & Holtzoff, *Federal Practice and Procedure* § 8, p. 42 (1960). A similar comment appears in Wright, *Law of the Federal Courts*, § 58, p. 271 (3rd Ed. 1976).

One rationale behind the *Erie* decision was to prevent forum shopping by parties. In fact, this plaintiff could have sued in the State courts of New Jersey and obtained jurisdiction over all the parties. By deferring generally to the local district court judge, the parties are more apt to obtain an accurate reading of State law than if the circuit court, unfamiliar with the intricacies of local law, undertakes an independent review of State law. Deferring to the district court should reduce, albeit not eliminate, such forum shopping. In addition, imposing an independent standard of review will exacerbate an already overcrowded federal docket at the circuit level. Thus, in order to insure the most accurate reading of local law and to preserve judicial economy, the standard must be more restrictive than the independent review utilized by the Third Circuit.

The majority not only applied an erroneous standard of review, but also failed to give proper deference to the views of the only two New Jersey jurists in this case—the district judge and dissenting circuit court judge. Failure to give proper deference to these New Jersey jurists is a critical problem because the circuit court decision on questions of local law are virtually unappealable.

This Court has recited the obvious desirabilty of deferring to local judges, versed in the intricacies of local law, on close questions of State law. *Bernhardt v. Polygraphic Co.* 350 U.S. 198 (1955).[11] The majority's failure to utilize the proper standard of reviewing the district court's decision is compounded by its failure to pay any attention to the fact that its dissenting brother, also a member of the New Jersey bar, reached a conclusion identical to that of the local district judge. There cannot be a more compelling case than this one, where both the local district judge and dissenting circuit judge are members of the New Jersey bar and reach a contrary conclusion on New Jersey law, that the two member majority failed to give proper deference to their views. Only if this Court rejects the standard of review utilized by the Third Circuit will parties be protected from aberrant and virtually unappealable decisions of the circuit court in areas of law best left to the reasoned decisions of the local trial judge.

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11. See Kurland, *supra*, 67 *Yale Law Journal* 216-7.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT OF NEW JERSEY

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION

No. 74-430

GARY R. BECKER,
Plaintiff,

vs.

INTERSTATE PROPERTIES, et al.,
Defendants.

FISHER, District Judge

This matter comes before this Court on motions by defendants Interstate Properties, Interstate Properties Construction Corporation, Saul Silverman and Raymond Keyes for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiff has filed cross-motions for summary judgment as to all of the above defendants except Keyes, and in addition as to the defendant Windsor Contracting Corporation. Plaintiff also asks this Court to enter a default judgment as to defendant Edwards pursuant to Fed. R. Civ. P. 37(b)(2)(c). Jurisdiction is based upon diversity of citizenship [1] with the amount in controversy in excess of $10,000.

Plaintiff, an employee of subcontractor and third party defendant Wood Pine Constructors, Inc., was injured by a truck owned and operated by one of Wood Pine's sub-

1. Diversity of citizenship is improperly alleged in plaintiff's complaint as residency rather than citizenship is asserted. *Freedman v. Zurich Ins. Co.*, 284 F. Supp. 550, (W.D. Pa. 1967); *Whitelock v. Leatherman*, 460 F.2d 507 (10th Cir. 1972). Plaintiff will be given leave to amend his complaint. F.R.Civ.P. 15.

contractors, Windsor Contracting Corporation. Apparently while attempting to repair a malfunction in the truck on the job site, the plaintiff was crushed when the vehicle operated by one Edwards moved. Plaintiff's complaint, Count I, ¶¶13-15. Wood Pine had entered into a subcontract with the defendant Interstate Construction (principal contractor) and the plaintiff asserts that under this contract and the law of New Jersey, defendants Interstate Properties, Interstate Construction, Silverman and Keyes are liable for his injuries. He also asserts that defendant Edwards is liable by his negligence in moving the truck and that Windsor Contracting is liable under the doctrine of respondent superior.

The matter being before this Court as a diversity case, the law of New Jersey must be applied and to that extent this Court sits as only another court of the State. *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956). In determining New Jersey law, the pronouncements of the highest court in the State are to be followed and

> "[i]f there by no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State."

Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967). With these principles in mind, the Court proceeds to consider the case.

At the outset, plaintiff acknowledges what is clearly the law in this State, that:

> ". . . where a person engages a contractor, who conducts an independent business by means of his own employees, to do work not in itself a nuisance (as our cases put it), he is not liable for the negligent acts of the contractor in the performance of the contract. • • • Certain exceptions have come to be accepted, *i.e.*, (a) where the landowner retains control of the manner and means of the doing of the work which is the subject of the contract; (b) where he engages an incompetent contractor; or (c) where . . . the activity contracted for constitutes a nuisance *per se*."

Majestic Realty Associates, Inc. v. Toti Contracting Co., 30 N.J. 425, 430, 431 (1959); *Csaranko v. Robilt, Inc.*, 93 N.J. Super. 428, 433 (A.D. 1967). Plaintiff argues that the instant case falls within the three exceptions.

As to the first exception, where a person hires an independent contractor yet retains and continues to exercise control of the manner and means of doing the work he cannot escape liability by hiding behind the general rule. However:

> "[a]bsent control over the job location or direction of the manner in which the delegated tasks are carried out, the general contractor is not liable for injuries to employees of the subcontractor resulting from either the condition of the premises or the manner in which the work is performed. • • • Nor is his immunity disturbed by the exercise of merely such general superintendence as is necessary to insure that the subcontractor performs his agreement. • • • Of course, specific instances of direct interference which potentially cause injury to the employees of the subcontractor . . . will heap liability upon the shoulders of the general contractor."

Wolczak v. National Electric Products Corp., 66 N.J. Super. 64, 71 (App. Div. 1961). Under the terms of the subcontract, Interstates' control over Wood Pine's operations extended no further than determining that there was com-

pliance with the plans and specifications. *Marion v. Public Serv. Elec. & Gas Co.*, 72 N.J. Super. 145, 153 (App. Div. 1962). Moreover plaintiff does not point to any facts which support a contention that there was de facto control by the defendant. *Id.*

Plaintiff also contends that Interstate did maintain control over the insurance aspects of the work to be done in that it agreed to take out the necessary automobile insurance if Wood Pine failed to do so. At the outset it is clear that the "control" exception does not extend to non-work aspects of construction contracts. It is control and direction of the method and means of doing the activity which results in injury that leads to general contractor liability. *Trecartin v. Mahony-Troast Construction Co.*, 18 N.J. Super. 380, 386 (App. Div. 1952); *Marion*, *supra* at 153. Moreover, as will be seen in the examination of plaintiff's third party beneficiary claim, the contract did not provide that Interstate require automobile insurance for *every* subcontractor on the job site, nor, more significantly, for the subcontractor who owned the vehicle involved in the accident. Thus the defendant, Interstate, cannot be held liable under the first exception.

As to the third exception, this Court concludes that the activity involved in the instant case was neither ultra-hazardous or inherently dangerous. *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, 30 N.J. 425 (1959). The negligent acts alleged here involve the moving of a truck while repairs were being made. The activity at the time of the accident involved the paving of a parking lot. Such actions are not inherently dangerous.

> "The term signifies that danger inheres in the activity itself at all times, so as to require special precautions to be taken with regard to it to avoid injury. It means more than simply danger arising from the casual or collateral negligence of persons engaged in it under particular circumstances."

Id., at 435.

The second exception, the hiring of an incompetent contractor, is relied upon most heavily by the plaintiff. Placing great emphasis upon a statement in the *Majestic Realty* decision which Justice Francis himself called an "incidental comment," plaintiff argues that ". . . the competency of a contractor should not be restricted to considerations of skill and experience but should encompass financial responsibility to respond to tort claims as well." *Majestic Realty*, *supra* at 432. Justice Francis seemed to agree with this principle noting:

> "[t]he contractee, true, has no control over the doing of the work and in that sense is . . . innocent of . . . wrongdoing; but he does have the power of selection, and in the application of concepts of distributive justice perhaps much can be said for the view that a loss arising out of the tortious conduct of a financially irresponsible contractor should fall on the contractee."

Id. Justice Francis referred to the existence of liability insurance which is readily available and regarded as an ordinary business expense. It is important to note, however, that at the conclusion of this "incidental comment" the opinion states:

> ". . . no decision is rendered with respect to [this issue] and the matter is *expressly reserved.*" (Emphasis added.)

Id., at 433. Unfortunately the question has not been addressed by any New Jersey court since *Majestic*; thus the comment remains the only indication of whether such a principle of law does or should exist in this State.

In this diversity case, the Court must determine and apply the law of this State and presently must determine how much weight to give the discussion in *Majestic*. As one commentator has said:

> "[m]uch depends on the character of the dictum. Mere obiter may be entitled to little if any weight, while a carefully considered statement by the state court, though technically dictum, will carry great weight, and may even . . . be regarded as conclusive."

1 Barron & Holtzoff, *Fed. Prac. and Proc.* §8 at 41 (Wright ed. 1961). See also, *Hawks v. Hamill*, 288 U.S. 52, 59 (1933) regarding considered *dictum* versus mere *obiter*. With the discussion in *Majestic* being specifically called an "incidental comment" (the very definition of "obiter," see *Black's Law Dictionary*—"dictum" and "obiter"), and the Supreme Court's *express* reservation of the issue, this Court will consider the theory expressed but cannot view the discussion as binding or a clear and unequivocal statement of New Jersey law. Be this as it may:

> "[t]he court is not required to speculate on the basis of weak dicta what the state court's decision might be were the issue presented to it, but is free to decide what determination is most consistent with decided state law and policy. [Citations omitted.] To this end, analogous cases arising in other jurisdictions, as well as scholarly treatises and articles, may be referred to not as binding precedent but, to find if their bases of decision or rationale are consistent with precedents in the law of the forum state. *Carr v. American Universal Inc. Co.*, 341 F.2d 220, 223 (6th Cir. 1965)."

Teoben v. Ohio Casualty Insurance Co., 250 F.Supp. 853, 855 (E.D. Ken. 1966). With this in mind, the Court will proceed to consider the issue in the context of the instant case.

In *Majestic*, the plaintiff was the owner of a building which was damaged when an adjoining building was being demolished. What Justice Francis seemed to be suggesting in his comment was that the owner of the adjoining building would be liable for its own negligence in hiring a contractor to perform the demolition who was financially irresponsible (*i.e.*, had insufficient assets or had no insurance). If this is the law.:

> "[t]he fact of capacity to respond in damages . . .would be immaterial on the issue of [the contractor's] negligence in causing a plaintiff's injury. * * * [S]uch lack of capacity would be relevant only in an action against the contractee. And in any event, in the usual tort action against the [contractee (Interstate)], liability would not come into existence unless negligence of the contractor was established."

Majestic Realty, *supra* at 433. It should be noted that the contractee's:

> "[l]iability does not attach vicariously but because of the wrongful act in placing an incompetent in a position to do harm, [here, financial harm]."

Corleto v. Shore Memorial Hospital, 138 N.J. Super. 302, 307 (L.D. 1975).[2] See also 57 *C.J.S. Master-Servant* § 592 regarding *duty* of contractee-employer to select competent contractors.

In the instant case, the alleged negligence of Windsor Contracting's employee caused the plaintiff's physical injuries. Under the rule as plaintiff would apply it, Windsor Contracting's contractee, Wood Pine, would be liable for its own negligence in failing to hire a competent (finan-

2. The matter could conceivably be viewed as one of vicarious liability on the part of the contractee, however, this would seem to destroy the general rule altogether.

cially responsible) independent contractor, should Windsor Contracting be found to be unable to respond to the tort claim. But plaintiff's argument does not stop here. It is asserted that not only is Windsor Contracting unable to compensate plaintiff for his injuries, but that Wood Pine is also incapable of responding to a claim based upon its negligence—*viz.*, the hiring of an incompetent independent contractor. Thus, continuing to apply the rule, the defendant, Interstate, is liable for the aforesaid negligence of its independent contractor, because it breached its duty to select a competent contractor. In theory this view of the law could push the burden all the way up to the owner or original contractee.[3]

The rationale behind the general rule of nonliability is that:

> ". . . one person should not be compelled to answer for the fault or neglect of another over whom he has no control, and that the employer has a right to rely on the presumption that the contractor will discharge his legal duties owing to his employees and third persons."

17 *C.J.S. Master-Servant* §584 at p. 355. This rationale is not the complete answer however, for in addition to the innocent contractee is an equally, if not more innocent, third-party who is, in many cases, grieviously injured. Moreover, as Justice Francis points out, this injury ". . . arises out of the desire of the contractee to have certain activities performed", and the contractee would seem to have the power to select a contractor who is financially able to respond to losses arising out of his tortious conduct

3. This Court will assume for the purposes of argument that the Workmens' Compensation Act, N.J.S.A. 34:15-1 *et seq.*, does not bar suit by the plaintiff against his employer, Wood Pine, and its contractee for hiring incompetent contractors. The Court in no way intends to express an opinion on the question.

through insurance or otherwise. Insofar as the liability is passed up the line of contractee, insurance is also available to cover various acts or *omissions* of an insured which result in liability such as the failure to hire a competent contractor.

However plausible and appealing this distributive justice approach may be on the present facts, it is not without its problems when applied on a broader scale to other factual situations. It would seem that the expertise and business planning which go into a large commercial construction project should normally involve the procurement of automobile and other liability insurance as well, which would cover the acts and omissions of a contractor. Such is not the case, however, with persons of modest means and limited business experience who may hire an independent contractor. Expanding the application of the competency exception to this common law rule so as to transfer the hardship of an injured workman or other third party to a landowner who contracts to have his home built or a homeowner who contracts to have a swimming pool installed would be, it would seem, too burdensome. If the common law rule is to be altered or enlarged in the manner proposed by the plaintiff because of the social necessity of adequately compensating injured persons, this Court is of the view that such a change should come from the legislature after careful study of the social and economic impact it might have. This approach might foster a more narrow expansion of the common law rule and its exceptions so as to properly balance the interests examined above. A wholesale expansion of the competency exception which this Court cannot distinctly glean from New Jersey law and policy will not be done. See also discussion in *Matanuska Electric Association, Inc. v. Johnson*, 386 P.2d 698, 702, 703 (Alaska Sup. Ct. 1963) in which

the court, faced with the identical argument posed by the plaintiff regarding the failure to procure workmen's compensation insurance, decided against extending the competency exception to include the financial responsibility and refused to hold all employers of independent contractors liable for the latter's omission; *accord Coleman v. Silverberg Plumbing Co.*, 69 Cal. Rptr. 158, 163 (Ct. of App. 1968).[4]

II

Plaintiff also asserts an alternative basis for recovery against defendant, Interstate, *viz.* that he is a third-party beneficiary of the Interstate-Wood Pine contract. Plaintiff relies heavily upon the case of *James Stewart & Co. v. Law*, 233 S.W. 2d 558, 22 ALR 2d 639 (Tex. S.Ct. 1950). In that case the court found that the contract between the owner and the general contractor required the latter to see that all subcontractors carried automobile liability insurance. In view of this, it was held that the plaintiff, owner's employee, could maintain suit against the general contractor as a third-party beneficiary of the contract when plaintiff was injured by an uninsured subcontractor's truck. There is no reason why the third-party beneficiary theory could not be invoked to permit recovery under the right circumstances, and this Court would have no trouble applying the theory in the proper case. See generally, *Eschle v. Eastern Freight Ways, Inc.*, 128 N.J. Super. 299 (L.D. 1974). Whether this is such a case is another matter.

Plaintiff contends that the contract obligated Wood Pine to obtain automobile liability insurance coverage "for non-owned and hired vehicles" and obligated Interstate to take out and maintain this coverage at Wood Pine's expense if

4. It is interesting to note that the New Jersey Legislature has already dealt with the problems raised in the *Matanuska* case. N.J.S.A. 34:15-79 holds a contractor liable for compensation due an employee of a subcontractor if the latter fails to carry compensation insurance.

the latter failed to do so. From these provisions plaintiff draws its third-party beneficiary claim, but as will be seen, the contract does not permit recovery on such a theory. At the outset, terms requiring that Wood Pine, or in default thereof, Interstate obtain automobile liability insurance coverage for non-owned or hired vehicles of Wood Pine cannot be read as an obligation that all subcontractors be insured. These provisions clearly intend for the *insured* to be Wood Pine, and the coverage to include *its* non-owned and hired vehicles. These vehicles would include trucks or other moving machinery which Wood Pine might require and obtain for *its own* use on the project. If the terms "non-owned and hired vehicles" were intended to require coverage for Wood Pine's subcontractor's vehicles, this Court cannot perceive such intent especially in view of other contract language. See, ¶(a) of insurance rider which specifically refers, in a context different from automobile insurance, to the "Subcontractor's subcontractors". Thus when the contract meant to include Wood Pine's subcontractors, it said so.

From these and all other provisions of the insurance rider, this Court can find no obligation on the part of Interstate or Wood Pine to see that all subcontractors carried automobile liability insurance. Absent this, plaintiff cannot recover under any view of the third-party beneficiary theory.

III

Plaintiff next asserts that defendants Interstate, Silverman and Keyes are liable for the breach of their statutory duties as outlined in the *Construction Safety Act*, N.J.S.A. 34:5-166 *et. seq.* and/or the *Workers Health and Safety Act*, N.J.S.A. 34:6A-1 *et. seq.* At the outset, N.J.S.A. 34:5-166 *et. seq.* has not been viewed as an exception to the

common law independent contractor rule. *Csaranka v. Robilt, Inc.*, 93 N.J. Super. 428, 433 (A.D. 1967). Thus none of the individual defendants, nor necessarily the general contractor, Interstate, are liable under the *Act*. While the *Construction Safety Code*, N.J.A.C. 12:180-1.1 *et. seq.* places the primary responsibility for compliance with its requirements on the general contractor, the plaintiff has pointed to no provision of the *Code* which requires all subcontractors to be adequately insured or financially responsible. Nor can such a responsibility be reasonably inferred from any language in the *Code*.

Insofar as the *Workers Health and Safety Act* applies to each of the aforesaid defendants (*i.e.*, "employers" as defined in the Act, N.J.S.A. 34:6A-2(h)), their duty to ". . . install, maintain and use such employee protective devices and safeguards . . . as are reasonably necessary to protect life, health and safety of employees . . .", N.J.S.A. 34:6A-3, cannot be said to extend to require insurance or financial responsibility of everyone on a job site. Nor has plaintiff pointed to any administrative code provision suggesting same. Moreover, this Act was not intended to increase the burden of care ordinarily imposed by the common law of the State. N.J.S.A. 34:6A-17.

IV

Defendant Keyes has moved for summary judgment arguing that he had no involvement whatever with either the preparation of insurance specifications or supervision of subcontractors' compliance with such specifications. According to his affidavit, he was not retained by Interstate to perform the above or any supervisory activities, but only to prepare working drawings for the buildings under construction. Keyes Afft. ¶¶2-6. The plaintiff responds by noting that both Keyes and Silverman are named in the

Wood Pine subcontract as architects and were assigned various supervisory duties therein. Particularly as to Silverman, against whom plaintiff cross-motions for summary judgment, plaintiff alleges that he knew Wood Pine was a "small paving outfit", but made no effort to ascertain its financial or insurance status. Likewise he made no such inquiry as to Windsor Contracting.

In ruling upon these defendants' requests for summary judgment, the facts must be viewed in a light most favorable to the plaintiff herein. See, *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870 (3d Cir. 1972). While ". . . an architect must use the skill and care in the performance of his duties commensurate with the requirements of his profession . . .", 6 *C.J.S. Architects* §27, p. 490, 492, he need only exercise reasonable and ordinary care and diligence in superintending the construction site, and ". . . his duty does not extend to requiring [compliance] with statutory regulations for the protection of workmen . . .". *Id.*, at 493. Plaintiff would have this Court hold that Silverman failed to exercise reasonable care in failing to make sure that Wood Pine and Windsor Contracting were insured—as a matter of law. Plaintiff also asserts that there is at least a jury question on this point as to defendant Keyes. Yet plaintiff has cited no case and this Court can find none which even remotely suggests that the actions desired of these defendants are within their duty of ordinary and reasonable care or are commensurate with the requirements of their profession. This Court holds as a matter of law that these defendants were under no duty to make sure Wood Pine or Windsor Contracting were financially responsible or insured. The law has never required such action on the part of an architect and failure to inquire here cannot be said to be unreasonable conduct.

In addition, this Court find no grounds for holding Silverman or Keyes liable under the contract on any third-

party beneficiary theory. The contract does not require these defendants to inquire into the financial or insurance status of either Wood Pine or Windsor Contracting. See also discussion re: the contract, *supra*.

V

Plaintiff seeks entry of default judgments as to the defendant Edwards pursuant to F.R.Civ.P. 37(b)(2)(c). On February 23, 1976 the defendant Edwards was ordered to submit to depositions. Since that time, Edwards has not been heard from and apparently no one knows his whereabouts. Plaintiff's Brief p. 19. In view of this, plaintiff may take the necessary steps to have default entered on the record by the clerk pursuant to F.R.Civ.P. 55(a), and may formally move this Court for a default judgment in accordance with F.R.Civ.P. 55(b)(2). Such a judgment when entered, however, will only be an interlocutory judgment of default. Under New Jersey law, the granting of a final judgment of default against Edwards must be stayed until the completion of the trial on this matter. *Kople v. Zalon*, 121 N.J.L. 270, 272, 273 (Sup. Ct. 1938), appeal dismissed 122 N.J.L. 433 (E & A 1939).

As for plaintiff's motion for summary judgment against defendant Windsor Contracting Company, while this defendant admits that Edwards was its employee, Windsor Contracting, Answer: Count I, ¶3, it denies that Edwards was negligent in the instant case. With no additional facts as to the specifics of the accident and with defenses including the assertions of no duty and contributory negligence, this Court concludes that there are issues for trial before a jury and plaintiff is not entitled to a judgment as a matter of law in this case. See, *Kople, supra* where employee defaulted, employer admitted the master-servant relationship, but denied negligence and defended on the

latter ground. Moreover, as in that case, if Windsor Contracting is successful at the trial, this success would inure to the benefit of Edwards, even though he has defaulted. *Kople, supra* at 273.

For the foregoing reasons, the motions by defendants, Interstate Properties, Interstate Properties Construction Corporation, Saul Silverman and Raymond Keyes for sumary judgment are granted. Plaintiff's motions for summary judgment against the aforesaid defendants as well as defendant Windsor Contracting are denied. Plaintiff's motion for default judgment against defendant Edwards is denied at this time without prejudice, although plaintiff may seek such a judgment as discussed herein pursuant to F.R.Civ.P. 55.

Submit an order.

Dated: September 17, 1976

APPENDIX B

DISTRICT COURT
ORDER AND JUDGMENT

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION—No. 74-430

GARY BECKER,

Plaintiff,

vs.

INTERSTATE PROPERTIES, et al

Defendants.

This cause came on to be heard on motion of the defendants Interstate Properties, I.P. Construction Corp., Saul Silverman and Raymond Keyes for summary judgment and on cross-motion of the plaintiff for summary judgment against all of the aforesaid defendants except Raymond Keyes, and in addition against the defendant Windsor Contracting Corporation, pursuant to Rule 56, Fed.R.Civ.P., and for default judgment as to defendant Willard Edwards pursuant to Fed.Civ.P. 37(b)(2)(c), and the court having considered the pleadings in the action, interrogatories and answers, depositions and exhibits, briefs submitted, and having heard the argument of counsel, it is

ORDERED that plaintiff's cross-motions for summary judgment against defendants Interstate Properties, I. P. Construction Corp., Saul Silverman and Raymond Keyes be and the same are hereby denied, and it is further

ORDERED that plaintiff's motion for summary judgment against defendant Windsor Contracting Corporation be and the same is hereby denied, and it is further

ORDERED that plaintiff's motion for default judgment against defendant Willard Edwards be and the same is hereby denied without prejudice, and it is further

ORDERED that the motions of defendants Interstate Properties, I.P. Construction Corp., Saul Silverman and Raymond Keyes for summary judgment be and the same are hereby granted.

The undersigned having expressly determined that there is no just reason for delay, it is therefore

ORDERED, ADJUDGED and DECREED that the plainitff's complaint as against defendants Interstate Properties, I.P. Construction Corp., Saul Silverman and Raymond Keyes be and the same is hereby dismissed.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER,
United States District Judge

Dated: 9-27-76

APPENDIX C

OPINION OF THE THIRD CIRCUIT COURT OF APPEALS

(Filed December 21, 1977)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2520

GARY R. BECKER,

Appellant,

vs.

INTERSTATE PROPERTIES, INTERSTATE CONSTRUCTION CORPORATION, WINDSOR CONTRACTING CORP., WINDSOR CONTRACTING CORP., LAWRENCE CORPORATION, DIAMOND REO, JAMESWAY COMPANY, WILLARD F. EDWARD, JOHN DOE and RICHARD ROE, SAUL SILVERMAN, A.I.A., RAYMOND KEYES ENGINEERS

and

INTERSTATE PROPERTIES and I.P. CONSTRUCTION CORP.,

Third Party Plaintiffs,

vs.

WOOD PINE CONSTRUCTORS, INC.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

C.A. No. 74-430

ADAMS, *Circuit Judge.*

The task of a federal court sitting in diversity is frequently not an easy one, for it must foresake its realm of

expertise and assume the aspect of a court of the forum state. Even when applying well-settled law, the federal tribunal must be alert to nuances of precedent. Where, as here, a federal court is asked to pass on the implication of a declaration by a state high court of a new principle in an evolving area of the law, it must act with even greater sensitivity.

In this case, we are called upon to evaluate the effect of a dictum by the New Jersey Supreme Court that failure to insist on a financially-responsible independent contractor will subject the employer of that contractor to liability to uncompensated victims for the contractor's negligence. This endeavor is a perplexing one, but it is not one this court is free to avoid. In the course of discharging our obligation, we must choose either to reject or to accept a nascent legal rule, and thus risk distorting state law as must by an excess of conservatism as by insufficient attention to *stare decisis*.

A.

On August 31, 1972, appellant Gary Becker, a 19-year-old construction worker, was severely injured on his job site in Windsor, New Jersey when a heavy truck drove squarely over his pelvis.[1] Mr. Becker has sued to recover his damages, including the $35,000 in medical fees he had expended as of the time the complaint was filed.

The owner and general contractor of the $1.5 million shopping center project on which Mr. Becker was working at the time of the accident was I. P. Construction Corp. (hereinafter the developer).[2] Mr. Becker was employed

1. Since this case is before us on appeal from a summary judgment, all evidence in the record must be construed in the light most favorable to Mr. Becker, the appellant.

2. I. P. Construction is a wholly-owned corporate subsidiary of Interstate Properties, the owner of the property upon which the shopping center was being constructed.

by Wood-Pine Corp., a small company hired by the developer to pave the shopping center. The developer knew, or should have known, that Wood-Pine would hire subcontractors, since Wood-Pine itself had no trucks. In fact, Wood-Pine hired Windsor Contracting Corp., whose employee, Willard Edwards, drove the truck which injured Mr. Becker.[3]

There is evidence to indicate that I. P. at least on some occasions in the past, had required insurance coverage from its subcontractors (395a, 408a-411a). Also, there is evidence that the standard liability insurance coverage in the construction industry allows for recoveries of up to $250,000 per accident. In contrast, Windsor's automobile liability insurance coverage was only $10,000, and Windsor is only minimally capitalized.

To recover for his injuries in this diversity action, Mr. Becker sued Windsor and its employee for negligence, also asserting claims against the developer. Mr. Becker contends that he will be unable to recover his damages from Windsor because of Windsor's limited insurance coverage and marginal capitalization, and that the developer breached its duty in allowing such a financially-irresponsible contractor to be hired.

The district court granted summary judgment for the developer, holding that under New Jersey Law the developer could not be held liable for the tort of an independent subcontractor regardless of the financial status of such subcontractor. It is this conclusion that we review here.[4]

3. Provisions of the agreement between I. P. and Wood-Pine require I. P.'s written approval of any subcontract let by Wood-Pine for work at the shopping center. (480a ¶ 13) There is evidence to indicate that I. P. in the past, at least on some occasions, had required insurance coverage from its subcontractors (395a, 408a-411a).

4. Mr. Becker also advanced the contentions (1) that he was entitled to recovery as a third-party beneficiary of a requirement of insurance in I. P.'s contract with Wood-Pine; and (2) that Raymond Keyes Engineers (a consulting engineer for the shopping center project) and Saul Silverman (the architect for the project) were liable for their failure to assure that all subcontractors on the project were properly insured. We affirm the trial court's rejection of both claims, and the dismissal of Keyes and Silverman as defendants.

B.

Inasmuch as no New Jersey cases are squarely on point, it is important to make clear that our disposition of this case must be governed by a prediction of what a New Jersey court would do if confronted with the facts before us.[5] Such an estimate cannot be the product of a mere recitation of previously decided cases. Rather, as in any diversity case, a federal court must be sensitive to the doctrinal trends of the state whose law it applies, and the policies which inform the prior adjudications by the state courts.[6] A diversity litigant should not be drawn

5. E.g. *Huddell v. Levin*, 537 F.2d 726, 733 (3d Cir. 1976) ("This appeal requires us to predict how the New Jersey Supreme Court would react when presented with novel and difficult questions of tort law."); *Knapp v. North American Rockwell*, 506 F.2d 361, 367 (3d Cir. 1974) ("the rule we believe a Pennsylvania appellate tribunal would adopt if the case arose in the state courts"); *Keystone Aeronautics Corp. v. R. J. Enstrom Corp.*, 499 F.2d 146, 147 (3d Cir. 1974) ("our assigned role is to predict, not to form state law"); *Wise. v. George C. Rockwell Inc.*, 496 F.2d 384, 387 (3d Cir. 1974) ("we are bound to apply the standard of care the Delaware Supreme Court would apply were it faced with the issue now before us"); *Quinones v. U.S.*, 492 F.2d 1269, 1273 (3d Cir. 1974) *quoting Gerr v. Emick*, 283 F.2d 293, 294 (3d Cir. 1960) ("our own determination of what the Pennsylvania Supreme Court would probably rule in a similar case"); *Hiller v. Franklin Mint*, 485 F.2d 48, 51 (3d Cir. 1973) ("the rule New York would apply if faced with this issue"). *See* Wright, *Law of Federal Courts*, §58, 267-71 (3d ed. 1976); 1A *Moore's Federal Practice*, ¶0.309, 3323-3330 (2d ed.) and *id.* 125-130 (1976-77 Supp.) (collecting cases).

6. See *e.g. Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 205 (1955) state court decision will be followed where "there appears to be no confusion in the Vermont decision, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question"); *id.* at 208-11 ("As long as there is diversity jurisdiction, 'estimates' are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law" . . . "Law does change with times and circumstances and not merely through legislative reforms"). *Quinones v. United States*, 492 F.2d 1269, 1276-79 (3d Cir. 1974) ("spinning out applications of accepted precedents" in light of "rapid, if not revolutionary development in judge-made tort law of Pennsylvania courts"); Wright, *supra* note 5 at 269. (Judge Frank [in

to the federal forum by the prospect of a more favorable outcome than he could expect in the state courts. But neither should he be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show.[7]

The federal tribunal is thus obligated to follow the course that it expects New Jersey court would adopt in similar circumstances.[8]

Because we are dealing here with a summary judgment, our analysis is limited to the inquiry of whether any state of facts reasonably inferable from the record could entitle the plaintiff to send the case to the jury under New Jersey law. Our disposition is also influenced by the reluctance which New Jersey courts have manifested to dismiss innovative tort claims without full development of facts at trial.[9]

C.

It is true, as Mr. Becker suggests, that the concept of immunity of the employer of an independent contractor

Cooper v. American Airlines Inc., 149 F.2d 358, 359 (2d Cir. 1945)] thought that the test for the federal judge was: What would be the decision of reasonable intelligent lawyers, sitting as judges of the highest New York court, and fully conversant with New Jersey jurisprudence? It now seems clear Judge Frank was right").

7. *See* Moore, *supra* note 5 at 3324; Wright, *supra* note 5 at 269-270.

8. *Commissioner v. Estate of Bosch*, 387 U.S. 456, at 465 (1965) ("The underlying substantive rule involved is based on state law and the states highest court is the best authority on its own law. If there be no decision by that court, then federal authorities must apply what they find to be the state law after giving proper regard to relevant rulings of the courts of the state. In this respect, it may be said to be, in effect, sitting as a state court.")

We have taken serious notice of the determination by the trial court that New Jersey would not adopt the position which we set forth. Judge Fisher's views, of course as a member of the New Jersey bar with long experience are entitled to great weight. Nonetheless, since his analysis rested solely on general policy and out-of-state cases, we do not believe the trial judge's views bind us.

9. *See e.g. Jackson v. Muhlenberg Hospital*, 249 A.2d 65, 53 N.J. 138 (1969); *Linn v. Rand*, 140 N.J. Super. 212, 356 A.2d 15 (App. Div. 1976); *Bennett v. T&F Distributing Co.*, 117 N.J. Super. 439, 285 A.2d 59 (App. Div. 1971).

is in tension with the more general tort doctrine of *respondeat superior*, and that the former represents a judicial gloss on the latter.[10] Indeed some authorities have advocated the all-out abolition of the independent contractor immunity,[11] and one noted commentator has espoused the view that the proliferation of exceptions to the immunity precept is "sufficient to cast doubt on the validity of the rule."[12]

Nonetheless, we discern no indication that the New Jersey courts are prepared to abandon on a wholesale basis the rule of an employer's immunity for the acts of his independent contractors and to adopt a pure theory of "enterprise liability." Instead, the New Jersey courts have adhered to the general doctrine of immunity, and the liability of employers has emanated from the exceptions articulated in *Majestic Realty Associates Inc. v. Toti Contracting Co.*[13]

Under *Majestic*, an employer is responsible for the negligence of an independent contractor if one of three special circumstances is present:

10. *See* W. Prosser, *Handbook of the Law of Torts* 468-69 (1971); Note, *Risk Administration in the Marketplace; A Reappraisal of the Independent Contractor Rule*, 40 *U. Chicago L. Rev.* 661-664 (1973). Indeed, the early cases, both British and American, applied the doctrine of *respondeat superior* to independent contractors. *See Bush v. Steinman*, 1 Bos. & P. 404, 121 Eng. Rep. 978 (S.P. 1799); *Lowell v. Boston 7 L.R. Corp.*, 23 Pick. Mass. 24 (1839).

11. Note, *Risk Administration in the Marketplace, supra* note 5 at 675-79 (suggesting joint liability of employer and contractor with indemnification agreements allowed); *cf.* Calabresi, *Some Thoughts on Risk Distribution and the Law of Tort*, 70 *Yale L.J.* 499, 545 (1960) (applicability of independent contractor exception should be "narrower"); Morris, *Torts of Independent Contractors*, 29 *U. Ill. L. Rev.*, 339 (1934) (applicability of exception should generally be limited to those not in a position to select responsible contractor, or where risk of harm from business is light).

12. Prosser, *supra* note 10 at 468. *See Pacific Fire Ins. Corp. v. Kenny Boiler and Mfg. Co.*, 201 Minn. 500, 503, 277 N.W. 226, 228 (1927) ("Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions.").

13. 30 N.J. 425, 153 A.2d 321 (1959).

(1) where the employer retains control over the aspect of the activity in which the negligence occurs;

(2) where the contractor employed is incompetent; or

(3) where the performance of the contract involves an inherently dangerous activity.[14]

The sharp conflict in the case at hand centers on Mr. Becker's contention that by hiring or permitting the hiring of Windsor—a contractor financially unable to respond in damages—the developer came within the second exception to the immunity rule. Mr. Becker places his reliance primarily on a passage from *Majestic* suggesting that, as a matter of distributive justice, employer should be liable for the torts of financially-irresponsible contractors. A proper construction of that key passage is crucial to the outcome of this litigation.

D.

In *Majestic*, the New Jersey Parking Authority hired Toti Contracting Co. as an independent contractor to demolish a building owned by the Authority. Toti's employees negligently allowed a part of the demolished building to collapse and to damage Majestic's adjoining property. In an unanimous opinion adjudicating Majestic's claim against the Parking Authority, the New Jersey Supreme Court began by articulating the general rule that employers are immune from liability arising out of the torts of their independent contractors, and set forth the general exceptions to the immunity concept that are adumbrated above. After eliminating the "control" exception as a factor in the case, the New Jersey Supreme Court discussed at length the argument that employing a financially-irresponsible contractor is tantamount to hiring one who is incompetent, and therefore comes within the second exception. The Court cited several commentators advocating such a rule,[15] and then noted that the principle had not been applied previously. Justice Francis went on to state for a unanimous court, albeit in what was characterized as "an incidental comment.":

> Inevitably the mind turns to the fact that the injured third party is entirely innocent and that the occasion for his injury arises out of the desire of the contractee to have certain activities performed. The injured has no control over or relation with the contractor. The contractee, true, has no control over the doing of the work and in that sense is also innocent of the wrongdoing; but he does have the power of selection and in the application of concepts of distributive justice perhaps much can be said for the view that a loss arising out of the tortious conduct of a financially irresponsible contractor should fall on the contractee.[16]

Imposition of liability under such circumstances is particularly appropriate, the Court said, in light of the ready availability of liability insurance, which is viewed as a normal cost of doing business in the construction industry.[17] Nonetheless, the issue was expressly reserved.

Since the financial-irresponsibility contention had not been raised in appellate briefs or at trial in *Majestic*, the New Jersey Court declined to rule on it. Instead it held the Authority liable on the ground that demolition constituted an "inherently dangerous" activity.

The initial step in our inquiry as to the probable reaction of New Jersey courts to the suggested financial-

14. 30 N.J. at 430-35, 153 A.2d at 324-26.

15. *Majestic Realty, supra* 30 N.J. at 432, 153 A.2d at 324.
16. 30 N.J. at 432, 153 A.2d at 324-25.
17. 30 N.J. at 433, 153 A.2d at 325.

responsibility criterion must be an examination of the reception that has been accorded the *Majestic* dictum by the New Jersey judiciary. The *Majestic* court's suggestion of employer liability for hiring a financially-irresponsible contractor evoked a flurry of contemporaneous commentary, predominantly favorable.[18] Nonetheless, since its enunciation, the financial-responsibility test has not come before the New Jersey courts. We thus have no directly applicable precedent upon which to rely.

However, the New Jersey courts since *Majestic* have consistently acknowledged both the rule of immunity and its tripartite exceptions.[19] Indeed, the three most recently reported independent contractor decisions of the New Jersey appellate bench have held against employer immunity on somewhat novel grounds.[20] One of these

18. Cowan, *Reform in the Law of Torts*, 14 *Rutgers L. Rev.* 356, 369 (1960) ("If the contractee wants the benefit of a financially-irresponsible contractor, he ought not complain at the operation of the doctrine of *respondeat superior.*"); Morris, *Agency and Partnership, Id.* at 375, 378 ("significant advance," "great step forward"); Note, 9 *Catholic L. Rev.*, 106, 107 (1960) ("not an unreasonable obligation"); *but* see Comment, *Should Financial Irresponsibility Theory Become a Reality*, 64 *Dick. L. Rev.* 305 (1960) (questioning advisability of carving another exception to the "fault" principle). *See also* Note, *Risk Administration in the Marketplace, supra* note 5 at 667-68.

19. *Rodrigues v. Elizabethtown Gas Co.*, 104 N.J. Super. 436, 250 A.2d 408 (App. Div. 1969); *Csaranko v. Robilt, Inc.*, 93 N.J. Super. 428, 226 A.2d 43 (App. Div. 1967); *Marion v. Public Service Elec. and Gas Co.*, 72 N.J. Super. 146, 178 A.2d 57 (App. Div. 1962); *Wolczak v. National Electric Products Corp.*, 66 N.J. Super. 64, 168 A.2d 412 (App. Div. 1961); *Araujo v. New Jersey Natural Gas Co.*, 62 N.J. Super. 88, 162 A.2d 299 (App. Div.), *cert. denied* 33 N.J. 329, 164 A.2d 381 (1960).

20. *Corleto v. Shore Mem. Hosp.*, 138 N.J. Super. 302, 350 A.2d 534 (Law Div. 1975) (hospital potentially liable for allowing incompetent M.D. to use operating room. Citing *Majestic* for incompetent contractor doctrine); Hill v. Newman, 126 N.J. Super. 557, 316 A.2d 8 (App. Div.), *certif. denied* 64 N.J. 508, 317 A.2d 720 (1973) (contractor's apparent authority sufficient to allow suit against contractee *Majestic* cited for general rule); *Bennett v. T. & F. Distributing Co.*, 117 N.J. Super. 439, 285 A.2d 59 (App. Div. 1971) *certif. denied* 60 N.J. 350, 289 A.2d 795 (1972). (Summary judgment for defendant denied in action for assault by independent door-to-door salesman, where defendant contractee should have known that salesman had record of vicious propensities.) After this case was argued, counsel brought to our attention the cases of *Horton v. American Institute for Mental Studies*, (slip op. October 1977, No. L-26833-74 (Law. Div. N.J. Super.) and *Bortz v. Rammel*, A.2d , 151 N.J. Super. 312 (App. Div. 1977), in which employers of independent contractors were exposed to liability on the basis of violations by the contractor of the New Jersey Construction Safety Act, N.J. Stat. Ann. 34:5-166 *et seq.* Those cases may establish still another exception to employer immunity. *Cf.* note 42 *infra*.

cases, *Bennett v. T&F Distributing Co.*,[21] quoted *Majestic's* discussion regarding "distributive justice" *in extenso* as an authoritative exposition of the "policy considerations" upon which it based its decision.[22] It appears, therefore, that the *Majestic* dictum is regarded by a New Jersey court of state-wide jurisdiction as persuasive, and that immunity for independent contractees is not an ironclad rule of New Jersey jurisprudence. We must therefore look to the more general principles which govern New Jersey courts in the their exposition of common law doctrines.

E.

In applying the common law, the New Jersey courts have been sensitive to the considerations of substantive policy which must temper the doctrine of *stare decisis*. As the New Jersey Supreme Court specifically declared in *Immer v. Risko:*[23]

> The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice.

The flexible approach set forth in *Immer* has been particularly evident in the area of tort law, where New Jersey

21. *Supra* note 20.

22. 117 N.J. Super. 444-45, 285 A.2d at 62.

23. 56 N.J. 482, 487, 267 A.2d 481, 484 (1970) *quoting Long v. Landy*, 35 N.J. 44, 50-51, 171 A.2d 1, 4 (1961). The court in *Immer* applied this doctrine as warrant to "determine whether the reasons behind [inter-spousal] immunity are present in the case before us." The court concluded that such immunity was inappropriate.

courts have been notably willing to reexamine and modify traditional doctrine.[24]

This case brings before us a young construction worker whose body has in all probability been ruined for life. Yet, he is denied all but nominal recovery against the subcontractor who is responsible for his injury because that subcontractor is effectively judgment-proof[25] and was not required by the developer to carry standard insurance.[26] In such a situation, we believe the goals of New Jersey tort law in three areas would impel a New Jersey court to hold that the failure to engage a properly solvent or adequately insured subcontractor is a violation of the duty to obtain a competent independent contractor.[27]

First, the New Jersey courts have manifested a concern in their formulation of tort law to ensure that the burden of accidental loss be shifted to those best able to bear and distribute that loss rather than having it imposed on the

24. *See, e.g. Linn v. Rand*, 140 N.J. Super. 212, 218, 356 A.2d 15, 17 (App. Div. 1976) ("[O]ur goal is to do substantial justice in light of the mores and needs of our modern day life;" citing cases in which this goal required reexamination of common law doctrines). *Cf. Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29, 42, 141 A.2d 276, 283 (1958) ("It should be borne in mind that we are not dealing with property law or other fields of the law where stability and predictability may be of the utmost concern. We are dealing with the law of torts, where there can be little if any justifiable reliance and the rule of *stare decisis* is admittedly limited.") (eliminating charitable immunity to tort suit).

25. Windsor's owner estimated its net worth at the time of the accident to be "a couple of thousand dollars," since its equipment was wholly financed. (113a).

26. In his deposition, Saul Silverman, the architect in charge of the construction site, described an insurance coverage of $10,000 as "ridiculous."

27. It is true that *Majestic* involved a suit against an employer for the tort of his contractor, rather than a suit against an employer for the tort of his contractor's subcontractor, as here. As noted above, however, I. P. retained authority over the choice of subcontractors by Wood-Pine; any subcontract required specific authorization by I. P. *See* note 3 *supra*. Thus, if Wood-Pine breached a duty in choosing its subcontractor, I. P. is chargeable with Wood-Pine's negligent choice of a subcontractor under the standard tort doctrine that retention of control by the employer of an independent contractor subjects the employer to liability. *See Majestic Realty Associates v. Toti Contracting Co.*, 30 N.J. 425, 430, 153 A.2d 321, 324 (1959), Prosser, *supra* note 10 at 469.

hapless victim.[28] In holding a mass-housing developer liable for a dangerously constructed hot-water heater in one of the homes he built, for example, the New Jersey Supreme Court placed great weight on the fact that "the builder-vendors are admittedly in a much better position than the injured party to absorb the crippling losses caused by their own . . . defective construction."[29] Similarly, in declaring that an implied warranty of fitness is deemed to be a part of an automobile leasing agreement, the New Jersey Supreme Court stated that warranties of fitness are regarded as an incident of a transaction in part "because one party to the relationship is in a better position than the other to . . . distribute losses which may occur because of a dangerous condition of the chattel."[30]

28. In *Collopy v. Newark Eye and Ear Infirmary, supra* 27 N.J. at 34, 141 A.2d at 282, the New Jersey Supreme Court cited the explanation of Professors Harper and James, 2 *The Law of Torts*, 1669 (1965) as the "true ground of vicarious liability in our law." That work interprets the "true justification" for vicarious liability to be "its tendency to provide compensation for the innocent victims of an enterprise and to distribute the burden of these losses broadly through the personas or institutions engaged in that enterprise." *See Calabresi, supra* note 10, at 517-545; Comment, *Responsibility for the Torts of an Independent Contractor*, 39 *Yale L.J.* 861-73 (1930) (suggesting that a "desire to assure compensation" is at the root of *respondeat superior* and exceptions to the general independent contractor rule).

29. *Schipper v. Levitt and Sons, Inc.*, 44 N.J. 70, 87, 207 A.2d 314, 323 (1965). *See id.* at 326 ("The public interest dictates that if such injuries do result from the defective construction the cost should be borne by the responsible developer . . . who is in a better position to bear the loss.")

30. *Cintrone v. Hertz Truck Leasing and Rental Service*, 45 N.J. 434, 446, 212 A.2d 769, 775 (1965). *See Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 356 A.2d 458 (App. Div. 1976) (liability of successor corporation for defective product of original corporation), *citing with approval Knapp v. North American Rockwell*, 506 F.2d 361 (3d Cir. 1974) (successor company is in better position to absorb losses than injured party.)

The New Jersey courts have also used the lack of ability to bear and spread losses as a reason for not imposing liability. In *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A.2d 539, 545 (1967), *aff'd. per curiam* 100 N.J. Super. 223, 241 A.2d 637, *aff'd. per curiam* 53 N.J. 259, 250 A.2d 129 (1969), the court noted in denying a claim of strict liability against a dentist:

> The "risk distributing theory" is a relevant consideration. But again, we must appreciate the context in which it has been applied in our cases. In *Henningson, Santor, Schipper* and *Cintrone*, it was considered in holding liable the manufacturer or lessor, who put the goods in the stream of commerce. Such a party may fairly be assumed to have substantial assets

In this case, as in any case in which a financially-irresponsible contractor is hired, the choice of the party to bear the loss falls between the developer and the victim. Where, as here, the developer is a substantial entrepreneur and a member of an industry that carries large liability insurance policies as a matter of course, there is little question but that he is in the better position to bear the loss of such an accident.[31] Moreover, the developer can spread the increased costs of insurance or liability to ultimate users of the project. It is only in rare circumstances that a victim will have a similar option. Thus in a context such as we have here the doctrine suggested in *Majestic* is indicated by the policies previously adopted by the New Jersey courts.[32]

and volume of business and a large area of contacts over which the risk can be widely spread. . . . It is the "large-scale" enterprise which should bear the loss. . . . The impact of liability upon such a defendant is miniscule in comparison with that of (sic) an individual dentist or physician. . . .

31. At the time that the doctrine of non-liability for acts of independent contractors was formulated, insurance markets were not nearly as extensive or sophisticated as they are today. *See* Hall, *Contractors' Liability Insurance For Property Damage Incidental to Normal Operations—The Standard Coverage Problem*, 16 *Kansas L. Rev.* 181, 181-82 (1968) (contractor's standard liability insurance emerged in 1930s). Indeed, Professor Morris, *supra* note 11, suggested in 1934 that indemnity bonds be the primary method of assuring responsibility.

The New Jersey courts in other areas have been sensitive to the impact of the growth and availability of insurance upon the rationale for common law immunities. In *Immer v. Risko*, 56 N.J. 482, 489, 267 A.2d 481, 484 (1970), the court said:

> [R]ealistically, is must be remembered when dealing with the question of conjugal harmony that today virtually every owner of a motor vehicle with a sense of responsibility carries liability insurance coverage. The presence of insurance militates against the possibility that the interspousal relationship will be disrupted, since a recovery in most cases is paid by the insurance carrier, rather than the defendant spouse.

Similarly, in *Collopy v. Newark Eye and Ear Infirmary*, *supra* note 24, the court stated that the availability of insurance had "undoubtedly been a factor" in the strong trend toward the rejection of charitable immunity, citing a previous concurring opinion that noted: "availability of insurance has obviated any threat that recoveries against charities would seriously deplete their funds and deprive communities of their benefits." 27 N.J. at 40, 141 A.2d at 282.

32. Where the employer is likely to be impecunious, of course, different considerations come into play. Nothing but a rigid adherence to legal formalism, however, dictates that the same rule must govern the case of a private

Second, it is a well-recognized principle of tort law that where feasible, liability for an accident should be allocated to those in the best position to control the factors leading to such accidents.[33] Indeed, this is said to be the basis for the independent contractor exception to *respondent superior*—the independent contractor is in a better position to control the work of his employees than is his employer.[34]

In this situation contemplated by the financial-irresponsibility exception, however, the loss must fall either upon the developer or upon the victim, for the subcontractor is by definition incapable of bearing it. In general, the developer has more control than the victim.

More importantly, however, in the context in which the *Majestic* dictum applies, two elements have conjoined to give rise to the loss before the Court: the negligence leading to an injury and the failure to assure the financial responsibility that would allow compensation for the dam-

individual contracting for repairs on his house as applies to the relation between a commercial developer and his subcontractor.

Similarly, where the independent contractor is solvent, there is little *a priori* reason to believe that he, rather than the contractee is better able to bear and distribute losses. *See Calabresi*, *supra* note 11, at 545-46; Douglas, *Vicarious Liability and the Administration of Risk*, 38 Yale L.J. 584, 594-600 (1929) (Professor W. O. Douglas, later Justice Douglas).

33. *E.g.*, *Cintrone v. Hertz Truck Leasing and Rental Service*, 45 N.J. 434, 446, 212 A.2d 769, 775 (1969) (warranty implied because lessor in a better position to know and control the condition of the chattel); *Santor v. A & M Karaguesian Inc.*, 44 N.J. 52, 64, 207 A.2d 305, 311 (1965) (strict tort liability for defective products stems from fact that purchasing public has no knowledge or opportunity to determine the quality of articles bought); *Magrine v. Krasnica*, *supra* note 25. 94 N.J. Super. 228, 232-35, 227 A.2d 539, 542-43 (1967) (analyzing New Jersey cases: strict liability applies where defendant created the danger, or possesses a greater capacity, or expertise to control, or discover defect); *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 488, 356 A.2d 458, 458-59 (Law Div. 1976) (holding buyer of corporation manufacturing defective product subject to products liability suit), *citing with approval Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974) (manufacturer's successor is in better position to gauge risks and costs of meeting them). *See e.g.* Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972); Calabresi, *Toward a Test For Strict Liability in Torts*, 81 Yale L.J. 1055 (1972).

34. *See* Prosser, *supra* note 10 at 468; Douglas, *supra* note 32 at 600-601.

ages flowing from such negligence.[35] While the developer might be in a disadvantageous position to control the negligent conduct, in a case such as this—where the developer has negotiated at length regarding the insurance coverage of his independent contractor—he is in an excellent position to assure the proper degree of financial responsibility. The doctrine suggested by *Majestic* places the costs of a failure to insure, and the consequent incentives, on the party in a superior position to evaluate and avoid such costs.[36]

In this connection it is in order to note the definition of legal duty adopted by the New Jersey Supreme Court in *Kahalili v. Rosecliff Realty Inc.*[37]

> [T]he standard of conduct laid down by the law is care commensurate with the reasonably foreseeable risk of harm, such as would be reasonable in light of the apparent risk.

Using *Kahalili* as an analogue, the question for the jury in this case, is whether the behavior of the developer in failing to obtain or to require adequate insurance was reasonable in light of the apparent risk that an individual seriously injured by one of its contractors would go substantially without compensation.

Third, the New Jersey courts have expressed the view that the costs of accidents should be borne by those who secure the benefit of the activities that engender the mishaps.[38] Where only one party is involved, a decision de-

35. *See* Calabresi, *The Costs of Accidents*, 58-59 (1970).

36. *See* Morris, *supra* note 18 at 378 (suggesting this is the effect of the *Majestic* rule), *cf.* Harper and James, *supra* note 28 at 1364 n.12 (suggesting that "strategic position" of employer to take out liability insurance is one modern basis for *respondeat superior*).

37. 28 N.J. 585, 603, 141 A.2d 301, 305 (1968).

38. *Santor v. A. & M. Karagusian Inc.*, 44 N.J. 52, 65, 207 A.2d 305, 308, 311 (1965) (strict liability in product liability case: "the obligation of the manufacturer thus becomes what in justice it ought to be—an enterprise liability . . . [whose purpose] is to insure that the cost of injuries or damage . . . is borne by the makers of the products who put them in channels of trade"); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314, 325 (1965) (similar considerations apply to mass developer); *see* Prosser, *supra* note 10 at 488 (noting this position); Harper and James, *supra* note 28 at 1400 (adopting this position); Calabresi, *supra* note 11 at 500-507; Note, *Borrowed Servants and the Theory of Enterprise Liability*, 46 Yale L.J. 807, 813-815 (1967). It has been argued that forcing businesses to take account of the costs they impose on society in the form of accidents is necessary to promote economic efficiency. *E.g.* Calabresi, *supra*; Note, *Borrowed Servants*, *supra*.

clining to insure carries with it an automatic penalty: unshielded liability to tort judgments. By hiring an independent contractor, however, without the rule suggested by *Majestic*, the developer could obtain the advantage of lowered operating costs (passed on to him by his contractor in the form of reduced prices) without liability for the decision to expose third parties to the risk of uncompensated losses.[39] This is particularly so where, as here, the subcontractor has effectively shielded himself from suit by incorporating several minimally financed business entities.[40]

The *Majestic* doctrine would impose costs of financial irresponsibility on parties who benefit from that irresponsibility. In this respect also, such an approach seems fully at one with the goals of New Jersey law.

The dissent's disagreement with our assessment of New Jersey policy leans heavily on two statutes. The first, the New Jersey Construction Safety Act, N.J. Stat. Ann. §§34:5-166 *et seq.*, was enacted after the *Majestic* decision. We have found no indication in legislative history that the New Jersey Legislature intended to reject Justice Francis' dictum in *Majestic*. Indeed, as the dissent notes, the Act expressly leaves the "burden of care ordinarily imposed

39. *See* Cowan, *supra* note 18 at 389 (lowered operating costs for failure to insure may be crucial in construction bidding); Note, *Risk Administration in the Market Place*, *supra* note 10 at 676 (incentive to hire judgment proof contractors).

40. The record indicates that Pecan, the owner of Windsor, incorporated at least two entities to engage in the trucking business, and that the entities interchanged work schedules.

by the common law" unaltered. §34:5-177. In New Jersey, this wording cannot be said to connote the expectation of static adherence to precedent.[41]

The second statute relied on by the dissent, N.J. Stat. Ann. § 34:15-79, provides that contractors shall be liable for "compensation due" to employees of subcontractors when the subcontractors fail to carry mandatory workmen's compensation insurance. On its face, this statute would seem to suggest a concern on the part of the Legislature to insure that victims are reimbursed when injured by financially irresponsible subcontractors. Since that provision already had been adopted long before the 1938 revision of the statute, however, we do not read it to reflect the New Jersey Legislature's reactions to the position suggested by *Majestic* in 1959.

F.

Admittedly, the few cases in other jurisdictions to have addressed the question directly do not support Mr. Becker's contention, and the *Majestic* dictum has yet to be adopted outside of New Jersey.[42] However, in view of the strong policy considerations undergirding the *Majestic* reasoning, the cases from other jurisdictions rejecting it would appear to be neither dispositive nor even persuasive.

41. *See Immer v. Risko*, 56 N.J. 482, 485-87, 267 A.2d 481, 483 (1970) (holding that the New Jersey Married Persons Act providing that husband and wife were not enabled to "contract with, or to sue each other except as heretofore, and except as authorized by this chapter," "did not incorporate [inter-spousal] immunity, but rather the common law with its inherent capacity for change.") Two recent cases, however, read the Construction Safety Act to expand liability. *See* note 20 *supra*.

42. *Reid v. U.S.*, 421 F. Supp. 1244 (E.D. Cal. 1976) (no liability for failure to enforce workmen's compensation insurance requirement in the contract); *Hampton v. McCord*, 141 Ga. App. 97, 232 S.E.2d 582 (1977) (no liability for failure to require liability insurance of contractor); *Coleman v. Silverberg Plumbing*, 263 Ca. App. 2d 74, 69 Cal. Rptr. 158 (1968) (no liability for failure to insure compliance by contractor with statutory obligation of obtaining workmen's compensation insurance); *Matanuska Elec. Assn. v. Johnson*, 386 P.2d 698 (Alas. 1963) (same). *See ALI, Restatement of Torts, 2d*, § 411 comment g (1965) (taking no position on the issue of liability for financially irresponsible contractors on the ground that not enough cases have been decided).

Professors Harper and James have observed that judicial recognition of the sugestion that financial responsibility should breach the wall of independent contractor immunity is scanty. *Harper and James, supra* note 28 at 1405, § 26.11. *See id.* n.25 (Supp. 1968) (no further judicial acceptance). They manifest no hostility to such a recognition, however, particularly in view of their sharp questioning of independent contractor theory in relation to large enterprises. *Id.* at 1403.

Similarly, Dean Prosser sets forth, with apparent approval, the suggestion that "the insurance necessary to distribute the risk is properly a cost of [the employer's] business," although he notes that American courts "have not gone so far." Prosser, *supra* note 10 at 468.

43. *Supra* note 42.

44. *Supra* note 42.

45. In *Hampton, supra* note 42, the Georgia Court of Appeals rejected a claim of liability under the *Majestic* dictum without discussion, merely citing the *Restatement*, and inexplicably, referring the reader to *Majestic*. *Reid* was a cursory application of *Coleman* as the authoritative statement of California law.

46. *Coleman, supra* note 42, 69 Cal. Rptr. at 162 n.7 and n.8, 165.

47. *Id.* 69 Cal. Rptr. at 163-65. The court also gave weight to the fact that the claim arose with relation to workmen's compensation insurance which it noted was "of constitutional and statutory origin" and "are not deprived from common-law doctrines malleable to judicial reshaping."

Attention should focus primarily on *Coleman v. Silverberg Plumbing Co.*,[43] and *Matanuska Electric Assn. Inc. v. Johnson*,[44] since they represent the only extensive judicial discussion of the issue aside from *Majestic*.[45]

Coleman is more clearly distinguishable. First, the claim which *Coleman* rejected was specifically identified by the California Court as an attempt to impose strict liability on contractees for failure to insist on workmen's compensation coverage by their contractor. Unlike the present case, no negligence was alleged, and the California Court apparently took the broad nature of the claim into account in refusing to accept it.[46] Second, the *Coleman* Court relied heavily on its obligation to defer to a 1918 case of the California Supreme Court that declared unconstitutional a statute that imposed tort liability of precisely the sort contended for.[47]

In *Matanuska*, on the other hand, disposition of the claim rested squarely on an analysis of the policy opposing imposition of liability. The *Matanuska* Court, like the district court in this case, first based its opinion on an assumpton that any liability rule enunciated would apply to all independent contractor situations. The court argued that most of those adversely affected by the proposed rule would be "salaried working men and wage earners of modest means." In general, it concluded, no spreading of costs would be accomplished by imposing liability.[48] The *Matanuska* Court then noted that the plaintiff was not an uninvolved third party—as in most "incompetent contractor" cases—but was an employee of the uninsured contractor. As between the employee and the average, inexperienced contractee, the court stated, the employee may well have the better opportunity to evaluate the financial responsibility of a contractor.[49] And, although the *Matanuska* Court did not mention it, the employee may be in a position to extract higher wage payments for taking greater uninsured risks.

The first ground of analysis is applicable if the rule of law contended for is the elimination of all independent contractee immunity. However, the *Majestic* dictum contemplates no such rule, nor is one necessary to decide the present case. The principal defendant here is a large, sophisticated and well-financed general contracting corporation with extensive experience in an industry in which high-coverage insurance is a matter of trade practice. To say

48. *Matanuska*, 386 P.2d at 703, *supra* note 42.

49. *Id.* 386 P.2d at 702-03.

The Alaska court also noted that the legal requirement of workmen's compensation made it plausible to take the position that an employer was entitled to rely on compliance with the law.

Such an argument is inapplicable here. The New Jersey Legislature has left the obligation of contractors in this area to the development of the common law.

that it is negligent for such an entity to fail to take steps to assure the financial responsibility of its subcontractors does not inexorably require similar liability for modestly-financed individuals of limited business experience.

Matanuska's second point also is inapplicable here. In contrast to the situation contemplated by *Matanuska*, Mr. Becker was not an employee of an uninsured contractor. He was in no position to be aware of, and to bargain for, the relevant insurance coverage. Rather, he had been hired by a subcontractor who in turn employed the uninsured sub-subcontractor. It cannot be said that a 19-year-old employee of a building subcontractor is in a better position to know of, and to comprehend fully, the degree of insurance coverage carried by a subsubcontractor on the job than is a substantial and experienced housing developer.

No persuasive argument has been adduced by the cases that have declined to adopt the *Majestic* approach. Accordingly, it seems doubtful that a New Jersey court would give controlling weight to the decisions of tribunals of other states in the face of the considered reflections of its own Supreme Court.[50]

G.

The three concerns of tort law outlined above—spreading costs, minimizing losses, assuring that an activity's risks are borne by its beneficiaries—will not always point in one direction. Often trade-offs among those considerations will be necessary. And frequently they will, themselves, conflict with other elements of a just and reasonable outcome.

50. The dissent suggests that the principle advanced here will significantly limit the opportunities of independent contractors without "start-up" capital. This seems unlikely because even a minimally capitalized business presumably will be able to bear insurance premiums as operating costs. Moreover, there is no evidence to indicate that New Jersey wishes to subsidize struggling construction contractors by depriving accident victims of compensation.

But the case before us presents no occasion to face such difficulties.

When the objectives of spreading costs and ensuring victim compensation, the goal of encouraging action to minimize losses, and the end of placing the cost of risks upon those who profit from those risks are all served by a single doctrine, it would appear that such a precept would commend itself to the judiciary. When the effect of applying that doctrine is to assure the right of a tragically injured young person to have a day in court in which to seek recovery from a developer who failed to follow a trade practice which would have allowed compensation directly, I do not believe that application of that doctrine is at odds with intuitive notions of justice. When policy concerns and practical effect so merge to support a rule of law, and when no prior New Jersey case has rejected it, it seems reasonable to predict that such a rule would be adopted by the New Jersey courts.

H.

The scope of our decision here must be clearly understood. We assume in this opinion, without deciding, that the plaintiff's allegations that Windsor is liable for Mr. Becker's injuries are correct. This, of course, is ultimately a question for the jury. Likewise, we assume, as the plaintiff alleges, that Windsor will, in fact, be unable to respond to a damage award against it. This also is a matter for proof at trial.

Moreover, we take as given, on the basis of plaintiff's allegations and the record before us, that the developer's failure to require financial ability to meet damage awards was an unreasonable violation of a trade practice. Whether I. P.'s actions were at variance with trade practice in the construction industry, and whether those actions were unreasonable are additional matters for the jury to decide. Finally, under the *Majestic* dictum, I. P. would be liable only for the difference between the insurance which it actually required and the amount it would have been reasonable, in the light of trade practice, to expect. This amount, too, is a matter to be determined by the jury at trial.

The case will be reversed and remanded for action in accordance with this opinion.

HUNTER, *Circuit Judge*, dissenting:

I respectfully dissent. The majority has, in my view, formulated a new duty in the law of torts, which until now has not been part of the law of any jurisdiction in this country. As we see it, this concept imposes liability upon a contractor for selecting a subcontractor who, though mechanically competent, is not sufficiently responsible financially. The majority's decision, in my belief, is not an apt prediction of what the New Jersey courts would hold had this case arisen within the state system.

The majority's statement of the principles by which a federal court, sitting in diversity, must determine an issue of state law not yet decided by the courts of that state is, of course, entirely correct. A federal court must make an informed estimate of what is the applicable state law when state precedent is unclear or incomplete with respect to an issue litigated before the federal court.[1]

Nevertheless, the majority's reliance on the *obiter dicta* in *Majestic Realty Associates, Inc. v. Toti Contracting Co.*[2]

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1. *See, e.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring).
2. 30 N.J. 425, 153 A.2d at 321 (1959).

and on its perception of the relevant policies considered by the New Jersey courts leads this court to impose a duty on those who engage independent contractors which I feel that New Jersey courts would be most reluctant to apply. The language in *Majestic Realty*, enshrouded in *caveats* and encircled with disclaimers of precedential value, must be viewed as a discussion of an issue neither decided by the trial court in the case nor briefed by the parties on appeal. Rather, the issue arose as "an emanation of the oral argument." As the majority has pointed out, Justice Francis characterized the portion of his opinion dealing with financial irresponsibility of independent contractors as an "incidental comment" for which "no decision is rendered" and on which decision was "expressly reserved." [3]

In the eighteen years since the *Majestic Realty* opinion was rendered, the New Jersey courts have not responded to Justice Francis' query whether liability might be imposed on the landowner who hires a financially irresponsible independent contractor through whose negligence a third party is injured. As the majority acknowledges, other states have not taken this step and imposed liability on one so far removed, if not isolated, from the *physical cause* of the injury.

Certainly a federal court sitting in diversity should not mechanically follow precedent and blindly apply principles of *stare decisis* when it appears that the corresponding state court would adjust its common law to meet changing conditions. At the same time, however, when no other court in this country has as yet broken from a traditional precept of the law, a federal court should proceed cautiously.

One important development in the law of New Jersey has been the advancements in the protection of the public

3. *Id.* at 433, 153 A.2d at .

from physical injuries by laws enacted by the legislature. In the construction industry, the state legislature has been active in defining standards of conduct by which construction sites can be made safer for employees on the site and the public. *See* New Jersey Stat. Ann. §§ 34:5-166 *et seq.*; New Jersey Admin. Code ch. 180.[4] These statutes and regulations have not gone so far as to impose upon developers or general contractors a duty of ensuring that subcontractors on a site be able to respond financially to tort claims arising out of their work. Rather, the legislature has sought to implement a policy of financial protection of workers on a construction project through New Jersey Stat. Ann. § 34:15-79, which states:

> . . . Any contractor placing work with a subcontractor shall, in the event of the subcontractor's failing to carry workmen's compensation insurance as required by this article, become liable for any compensation which may be due an employee or the dependents of a deceased employee of a subcontractor. The contractor shall then have a right of action against the subcontractor for reimbursement. . . .

Consequently, it appears that the legislature has provided a standard by which the duty of a developer-general contractor to require financial ability to respond to injuries suffered by an employee of an independent subcontractor

4. The Construction Safety Act, New Jersey Stat. Ann. §§ 34:5-166 *et seq.*, was adopted after the New Jersey Supreme Court's decision in *Majestic Realty*. 1962 N.J. Laws c. 45. Consequently, the legislature's activity in this field seemingly would be considered by a reviewing New Jersey court as indicative of a desire by the legislature to regulate the duties of care imposed on those engaging in construction. The statute does note that the legislature did not intend to increase the burden of care required by the state's common law. New Jersey Stat. Ann. § 34:5-177. However, the passage of the Act and promulgation of regulations pursuant to that statutory authority supports the contention that the legislature intended to become involved in determining the scope of duty of construction contractors.

or sub-subcontractor can be measured. Since the legislature has taken the initiative in formulating the duty of a general contractor to insure that injuries sustained on the job will be covered by workmen's compensation, I am unwilling to predict that the New Jersey courts would add on the requirement that "adequate" insurance coverage or its equivalent (apparently beyond workmen's compensation) be extended to all employees on a construction sit.[5]

Further, I have difficulty with the majority's formulation of the duty of a developer of land to take reasonable care that its independent subcontractors be able to respond financially, through insurance or otherwise, to claims for injuries suffered as a result of the contractor's negligence. The inexactitude of the standard for imposing liability arises since the majority limits the scope of the duty to include only those whose financial capabilities and business acumen are more than "modest."

To my knowledge, New Jersey courts have never defined the scope of a tort *duty* on the basis of an individual's financial capabilities. The majority's decision will, I think, cause uncertainty and doubt for every financial strata and every court, as well as hinder the employment opportunities of an independent contractor trying to enter the marketplace but lacking much in the way of start-up capital.

Behind this "duty" that the majority imposes lie significant policy questions relating to economic and social costs and benefits. It appears to me that the New Jersey courts would look to the legislature for the determination of whether to adopt this novel aspect of tort law.

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5. In this case, defendants I. P. Construction Corp. and Interstate Properties have been treated as one entity. Consequently, New Jersey Stat. Ann. § 34: 15-79 would apply to I. P. as general contractor. Thus it appears that the legislature has acted to define the scope of the duty of these defendants in this regard.

Certainly, the facts in this case are most compelling. However, I do not reach the conclusion that the New Jersey courts would decide the case in the manner in which the majority has determined. Thus I am unable to join in the court's opinion.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals
for the Third Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-2520

GARY R. BECKER,

Appellant,

vs.

INTERSTATE PROPERTIES, INTERSTATE CONSTRUCTION CORPORATION, WINDSOR CONTRACTING CORP., WINDSOR CONTRACTING CORP., LAWRENCE CORPORATION, DIAMOND REO, JAMESWAY COMPANY, WILLARD F. EDWARDS, JOHN DOE and RICHARD ROE, SAUL SILVERMAN, A.I.A., RAYMOND KEYES ENGINEERS

and

INTERSTATE PROPERTIES and I. P. CONSTRUCTION CORP.,

Third Party Plaintiffs.

vs.

WOOD PINE CONSTRUCTORS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D. C. CIVIL No. 74-430)

Present: ADAMS, VAN DUSEN and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 7, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed September 27, 1976, be, and the same is hereby reversed and the cause is remanded for action in accordance with the opinion of this Court. Costs taxed against appellees.

ATTEST:

Clerk

December 21, 1977

APPENDIX E

Workmen's Compensation Act

34:15-8. Election surrender of other remedies

Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article, and shall bind the employee himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong. As amended L.1961, c. 2, p. 14, § 1.

34:15-40. Liability of third party

Where a third person is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer or insurance carrier under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein. In the event that the employee or his dependents shall recover and be paid from the said third person or his insurance carrier, any sum in release or in judgment on account of his or its liability to the injured employee or his dependents, the liability of the employer under this statute thereupon shall be only such as is hereinafter in this section provided.

(a) The obligation of the employer or his insurance carrier under this statute to make compensation payments shall continue until the payment, if any, by such third person or his insurance carrier is made.

(b) If the sum recovered by the employee or his dependents from the third person or his insurance carrier is equivalent to or greater than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be released from such liability and shall be entitled to be reimbursed, as hereinafter provided, for the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents less employee's expenses of suit and attorney's fee as hereinafter defined.

(c) If the sum recovered by the employee or his dependents as aforesaid is less than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be liable for the difference, plus the employee's expenses of suit and attorney's fee as hereinafter defined, and shall be entitled to be reimbursed, as hereinafter provided for so much of the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents as exceeds the amount of such difference plus such employee's expenses of suit and attorney's fee.

(d) If at any time prior to the payment by the third person or his insurance carrier to the injured employee or his dependents, the employer or his insurance carrier shall serve notice, as hereinafter provided, upon such third person or his insurance carrier that compensation has been applied for by the injured employee or his dependents it shall thereupon become the duty of such third person or his insurance carrier, before making any payment to the injured employee or his dependents, to inquire from such

expenses incurred and compensation theretofore paid to the injured employee or to his dependents. Where such notice shall have been served, it shall further become the duty of such third person or his insurance carrier, before make any payment as aforesaid, to inquire from such injured employee or his dependents the amount of the expenses of suit and attorney's fee, or either of them in the action or settlement of the claim against such third person or his insurance carrier. Thereafter, out of that part of any amount about to be paid in release or in judgment by such third person or his insurance carrier on account of his or its liability to the injured employee or his dependents, the employer or his insurance carrier shall be entitled to receive from such third person or his insurance carrier so much thereof as may be due the employer or insurance carrier pursuant to subparagraph (b) or (c) of this section. Such sum shall be deducted by such third person or his insurance carrier from the sum to be paid in release or in judgment to the injured employee or his dependents and shall be paid by such third person or his insurance carrier to the employer or his insurance carrier. Service of notice, hereinbefore required to be made by the employer or his insurance carrier upon such third person or his insurance carrier, shall be by registeed mail, return receipt and in cases other than an individual shall be mailed to the registered office of such other third person of his insurance carrier.

(e) As used in this section, "expenses of suit" shall mean such expenses, but not in excess of $200.00, and "attorney's fee" shall mean such fee, but not in excess of 33⅓% of that part of the sum paid in release or in judgment to the injured employee or his dependents by such third person or his insurance carrier to which the employer or his insurance carrier shall be entitled in reimbursement under the provisions of this section, but on all sums in excess thereof, this percentage shall not be binding.

(f) When an injured employee or his dependents fail within 1 year of the accident to either effect a settlement with the third person or his insurance carrier or institute proceedings for recovery of damages for his injuries and loss against the third person, the employer or his insurance carrier, 10 days after a written demand on the injured employee or his dependents, can either effect a settlement with the third person or his insurance carrier or institute proceedings against the third person for the recovery of damages for the injuries and loss sustained by such injured employee or his dependents and any settlement made with the third person or his insurance carrier or proceedings had and taken by such employer or his insurance carrier against such third person, and such right of action shall be only for such right of action that the injured employee or his dependents would have had against the third person, and shall constitute a bar to any further claim or action by the injured employee or his dependents against the third person. If a settlement is effected between the employer or his insurance carrier and the third person or his insurance carrier, or a judgment is recovered by the employer or his insurance carrier against the third person for the injuries and loss sustained by the employee or his dependents and if the amount secured or obtained by the employer or his inrurance carrier is in excess of the employer's obligation to the employee or his dependents and the expense of suit, such excess shall be paid to the employee or his dependents. The legal action contemplated hereinabove shall be a civil action at law in the name of the injured employee or by the employer or insurance carrier in the name of the employee to the use of the employer or insurance carrier, or by the proper party for the benefit of the next of kin of the employee. Where an injured employee or his dependents have instituted proceedings for recovery of damages for his injuries and loss

against a third person and such proceedings are dismissed for lack of prosecution, the employer or insurance carrier shall, upon application made within 90 days thereafter, be entitled to have such dismissal set aside, and to continue the prosecution of such proceedings in the name of the injured employee or dependents in accordance with the provisions of this section.

(g) If such employee or his dependents effect a settlement with the third person or his insurance carrier or institute proceedings against the third person prior to the service of notice upon the third person or his insurance carrier of the compensation obligation of the employer or his insurance carrier or prior to the institution of any proceedings against the third person by the employer or his insurance carrier for the injuries and loss sustained by such employee or his dependents, such employer or his insurance carrier is barred from instituting any action or proceedings against the third person for the injuries and loss sustained by such employee or his dependents.

The words "third person" as used in this section include corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals. As amended L.1951, c. 169, p. 646, § 1; L.1956, c. 141, p. 574, § 6.

34:15-79. Penalty for failure to provide protection; contractor's liability for insurance

An employer who shall fail to provide the protection prescribed in this article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than sixty days or by both such fine and imprisonment, and in cases where a workmen's compensation award in the Division of Workmen's Compensation of New Jersey against the defendant is not paid at the time of the sentence, the court may suspend sentence upon such defendant and place him on probation for any period with an order to pay said compensation award to the claimant through the probation office of the county. Where the employer is a corporation, the president, secretary, and treasurer thereof who are actively engaged in the corporate business shall be liable for failure to secure the protection prescribed by this article. Any contractor placing work with a subcontractor shall, in the event of the subcontractor's failing to carry workmen's compensation insurance as required by this article, become liable for any compensation which may be due an employee or the dependents of a deceased employee of a subcontractor. The contractor shall then have a right of action against the subcontractor for reimbursement. * * *

APPENDIX F

Construction Safety Act

34:5-168. Construction Safety Act; compliance by employers in construction industry; certificate of registration; fees

Any employer engaging in any activity related to the erection, construction, alteration, demolition, repair or maintenance of buildings, structures, bridges, highways, roadways, dams, tunnels, sewers, underground buildings or structures, pipelines or ducts and all other construction projects or facilities, shall comply with all requirements reasonably necessary for the health and safety of employees and the general public. Such requirements shall be set forth in rules and regulations adopted under this act, the Construction Safety Act. The application and certificate forms shall be prescribed by the commissioner. • • •

34:5-177. Burden of care

This act shall not in any way increase the burden of care ordinarily imposed by the common law of the State upon those within its juridiction. L.1962, c. 45, §12.

APPENDIX G

Worker Health & Safety Act

34:6A-17. Existing rights or remedies unaffected; burden of care

This act shall not in any way enlarge or diminish any right or remedy otherwise existent pursuant to the Revised Statutes of New Jersey or at common law, or increase the burden of care ordinarily imposed by the common law of the State upon those within its juridiction. L.1965, c. 154, §17.

34:6A-22. Exemptions

This act is not intended to apply and shall not apply to the following: • • •

(c) Employment and places of employment subject to the provisions of the Construction Safety Act, P.L.1962, c. 45; • • •

APPENDIX H

N.J.A.C.–Worker Health and Safety Code

12:110-2.1 Words and phrases defined

The following words and terms, when used in this Chapter, shall have the following meaning, unless the context clearly indicates otherwise. • • •

"Safety provision" means a combination of parts, equipment and design to assure the safe use of the space of a building or structure exposed to conditions therein which may be dangerous to the health and safety of the occupants. • • •

CHAPTER 180

CONSTRUCTION SAFETY CODE

Authority

Unless otherwise expressly noted, all provisions of this Chapter 180 were adopted by the Commissioner of Labor and Industry, pursuant to authority delegated at *N.J.S.A.* 34:5-166 *et seq.*, the Construction Safety Act, filed and effective prior to September 1, 1969.

CHAPTER TABLE OF CONTENTS

SUBCHAPTER 9. POWER-DRIVEN SAWS

SUBCHAPTER 10. DEMOLITION

SUBCHAPTERS 11, EXCAVATIONS

SUBCHAPTER 12. STRUCTURAL STEEL ERECTION

SUBCHAPTER 13. FORMS, SHORES AND RESHORES AND CONCRETE WORK

SUBCHAPTER 14. LADDERS AND LADDERWAYS

SUBCHAPTER 15. SCAFFOLDS

SUBCHAPTER 16. RIGGING, ROPES AND CHAINS

SUBCHAPTER 17. WELDING AND CUTTING

SUBCHAPTER 18. WORK IN CONFINED SPACES

SUBCHAPTER 19. MATERIAL PLATFORM OR BUCKET HOISTS

SUBCHAPTER 20. EQUIPMENT FOR HANDLING AND HOISTING MATERIALS

SUBCHAPTER 21. WORKMEN'S ELEVATOR

SUBCHAPTER 22. HEATING EQUIPMENT AND FUELS

SUBCHAPTER 23. PILE DRIVERS

SUBCHAPTER 24. MIXING MACHINES

SUBCHAPTER 25. PAINTING

SUBCHAPTER 26. EXPLOSIVE POWDER ACTUATED TOOLS

SUBCHAPTER 27. UNDERGROUND EXCAVATIONS

FOREWORD

The Construction Safety Code presented on the following pages was originally promulgated by the Commissioner of Labor and Industry under authority of the Con-

struction Safety Act, P.L. 196, v. 42 (*N.J.S.A.* 34:2-~~166~~ *et seq.*), effective on November 15, 1963. This is the first revised edition of the Code. The revisions which were promulgated as a separate document on April 1, 1968 became effective on July 1, 1968. The revisions have been incorporated in this revised edition and, therefore, this Chapter contains all of the regulations promulgated under the Construction Safety Act, which were in effect on July 1, 1968.

12:180-2.1 Words and phrases defined

The following words and terms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise:

• • •

2.1.17 "Safe" means the state or condition of equipment, material, machinery, construction work and demolition work that prevents injury to persons or damage to property.

12:180-3.1 Protection of health and safety of employees and the general public

All places where employes are suffered or permitted to perform work of any kind in construction work or demolition work shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of employees and the general public.

12:180-3.8 Requirements of competence

When work is to be performed by or under the supervision of a designated person, that person shall have the degree of competence necessary to perform the work in a safe manner.

12:180-3.9 Requirement of quality

Materials, devices, structures, and methods and procedures of operation which are required by this Chapter and which are described by general descriptive terms such as adequate, proper, sufficient, and the like; shall be of such kind and quality as a reasonable and prudent man experienced in construction work or demolition work, as appropriate, would require in order to effect a safe operation.

APPENDIX I

CHAPTER 95

AN ACT to amend "An act concerning financial responsibility for damages caused by the operation of motor vehicles and repealing chapter 6 of Title 39 of the Revised Statutes," approved May 10, 1952 (P. L. 1952, c. 173).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

• • •

6. Section 24 of the act of which this act is amendatory is amended to read as follows:

24. A motor vehicle liability policy furnished as proof of financial responsibility as provided herein shall be a policy of liability insurance issued by an insurance carrier authorized to transact business in this State to the person therein named as insured, or in the case of a nonresident, by an insurance carrier authorized to transact business in any of the States or provinces hereinafter stated. The policy shall:

(a) Designate, by explicit description or appropriate reference, all motor vehicles with respect to which coverage is intended to be granted thereby, and insure the insured named therein and any other person using or responsible for the use of any such motor vehicle with the express or implied consent of the insured, against loss from the liability imposed upon the insured or other person by law, for injury to or the death of a person, other than a person who is covered, as respects the injury or death, by any workmen's compensation law, or damage to property, except property of others in charge of the insured or the insured's employees, growing out of the maintenance, use or operation of the motor vehicle in the United States of America; or

(b) In the alternative, insure the person therein named as insured against loss from the liability imposed by law upon the insured for injury to or death of a person, other than a person who is covered as respects the injury or death by any workmen's compensation law, or damage to property, except property of others in charge of the insured or the insured's employees, growing out of the operation or use by the insured of a motor vehicle, except a motor vehicle registered in the name of the insured, and occurring while the insured is personally in control, as driver or occupant, of the motor vehicle within the United States of America.

The policy shall insure to the amount or limit of $10,000.00, exclusive of interest and costs, on account of injury to or death of 1 person, and, subject to the same limit with respect to injury to or death of 1 person, of $20,000.00, exclusive of interest and costs, on account of 1 accident resulting in injury to or death of more than 1 person, and of $5,000.00 for damage to property of others, as herein provided, resulting from 1 accident, or a binder pending the issuance of any such policy, or an indorsement to an existing policy is hereinafter provided.

This section shall not be construed as preventing the insurance carrier from granting any lawful coverage in excess of or in addition to the coverage herein provided for, nor from embodying in the policy any agreement, provision or stipulation not contrary to the provisions of this chapter and not otherwise contrary to law.

Separate concurrent policies covering respectively (a) bodily injury or death, as aforesaid, and (b) property damage, as aforesaid, shall be considered a "motor vehicle liability policy" within the meaning of this act.

7. This act shall take effect January 1, 1959.

Approved July 1, 1958.

IN THE

Supreme Court of the United States

No. 77-1335

INTERSTATE PROPERTIES and
I. P. CONSTRUCTION CORP.,

Petitioners,

vs.

GARY BECKER,

Respondent,

INTERSTATE CONSTRUCTION CORP., WINDSOR CONTRACTING CORP., LAWRENCE CORP., DIAMOND REO, JAMESWAY COMPANY, WILLARD EDWARDS, A.I.A. RAYMOND KEYES ENGINEERS, and SAUL SILVERMAN,

Defendants,

WOOD PINE CONSTRUCTORS, INC.,

Third Party Defendant.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FROM THE THIRD DISTRICT

REASONS FOR DENYING WRIT

Introduction

The decision of the majority below was based upon unanimous dicta of the New Jersey Supreme Court in *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, 30 N.J. 425, 153 A.2d 321 (S. Ct. 1959). As confirmed in Point I, *infra*, every decision of the Supreme Court in

the 19 years subsequent to the *Majestic* decision has served to confirm the viability of that dicta. Suffice it to state, in such circumstances, that this Court does not ". . . ordinarily review the holding of the Court of Appeals on a matter of State law . . .". *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L.Ed.2d 288, 297 (1967).

Point II of petitioner's argument is essentially an *argumentum ad hominen* and clearly, in light of the existence of *Majestic Realty Associates, Inc. v. Toti Contracting Co., supra*, proceeds from a wrong premise, *i.e.*,

> ". . . The circuit courts . . . tend to defer to the District Court where there is no state precedent . . ." (P.C. pg. 21)

Simply stated, precedent abounds in New Jersey.

Point I

The decision below accurately reflects existing New Jersey law.

The basic thrust of the Petitioner's argument is that in the absence of any case directly in point, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 barred the District Court from fashioning any remedy which would fasten liability on the Defendants. Clearly, that case cannot be read to bar remedy simply because an identical case happens not to have arisen in the forum State.

One of the evils which the *Erie* decision sought to right was the favored suitor status of non-resident parties at the expense of resident parties which had resulted from the application of *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865. The basic holding was the law of the forum should be applied.

This Court has recognized that the law of the forum not always provide an identical factual pattern or specific holding for cases which may alternatively be brought at the Federal level.

In *Angel v. Bullington*, 330 U.S. 183, 67 S. Ct. 657, 91 L.Ed. 835, Justice Frankfurter noted that:

> "For purposes of diversity jurisdiction, a federal court is 'in effect, only another court of the State' . . .
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> • • •
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> "The essence of diversity jurisdiction is that a Federal Court enforces State law and State policy . . . What is most important, diversity jurisdiction must follow State law and policy. . . Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.
>
> ". . . *Erie R.R. Co. v. Tompkins* . . . drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective state courts or were barred by defense controlling in the state courts."

The type of inquiry which must be made to divine State law was outlined in *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 100 L.Ed. 100, 76 S. Ct. 273 wherein the Court commented that in respect to a particular Vermont holding,

> ". . . there is no later authority from the Vermont courts, that no fracture in the rules announced in those cases has appeared in subsequent rulings or dicta, and that no legislative movement is underway in Vermont to change the result of those cases. . . . As we have indicated, there appears to be no confusion in Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont Judges. . ."

In his concurring opinion, Justice Frankfurter observed that

> "As long as there is diversity jurisdiction, 'estimates' are necessarily often all the federal courts can make in ascertaining what the state court would rule to be its law. . ."
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> • • •
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> ". . . Law does change with times and circumstances and not merely through legislative reforms. It is also to be noted that law is not restricted to what is found in Law Reports, or otherwise written."

Erie R.R. Co. v. Tompkins, supra and its progeny thus have a dual thrust: a plaintiff is not entitled to greater protection than resident parties but, at the same time, he is certainly not entitled to no less.

Majestic Realty Associates, Inc. v. Toti Contracting Co., supra, was decided in 1959. The dicta in that case, wholly applicable here, interestingly served to forecast the undeniable and unswerving path which the New Jersey Supreme Court would thereafter take. The very following year, the important case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (S. Ct. 1960) was decided and the theory of distributive justice has guided the Supreme Court and the lower courts in New Jersey without variation since that time. A nonexhaustive list of subsequent decisions may be found in *Hollinger v. Shoppers Paradise of New Jersey, Inc.*, 134 N.J. Super. 328, 340 A.2d 687 (S. Ct. L.D. 1975) as follows:

> "Since the landmark case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), New Jersey has been in the forefront of jurisdictions extending protection to consumers by imposing strict liability in tort. The doctrine expressly has been extended to the manufacturer and/or seller of automobiles, Henningsen, supra; Scanlon v. Gen. Motors Corp., supra, 65 N.J. 582, 326 A.2d 673; Moraca v. Ford Motor Co., 66 N.J. 454, 332 A.2d 599 (1975); motorcycles, Sabloff v. Yamaha Motor Co., Ltd. 113 N.J. Super. 279, 273 A.2d 606 (App. Div. 1971), aff'd 59 N.J. 365, 283 A.2d 321 (1971); carpeting, Santor v. A. & M. Karagheusin, Inc., supra, 44 N.J. 52, 207 A.2d 305; grinding discs, Jakubowski v. Minn. Mining & Manufacturing, 80 N.J. Super. 184, 193 A.2d 275 (App. Div. 1963), rev'd on other grounds, 42 N.J. 177, 199 A.2d 828 (1964); mass-produced houses, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 413 (1965); cafeteria food, Sofman v. Denham Food Service, Inc., supra, 37 N.J. 304, 181 A.2d 168; a power punch press, Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 286 (1972); carbonated beverage bottles, Corbin v. Camden Coca-Cola Bottling Co., supra, 60 N.J. 425, 290 A.2d 441; permanent hair wave solution, Newmark v. Gimbel's Inc., supra, 54 N.J. 585, 258 A.2d 697; and water meters, Rosenau v. New Brunswick, etc., 51 N.J. 130, 238 A.2d 169 (1968); it also applies to lessors of rented motor vehicles and trailers, Cintrone v. Hertz Truck Leasing, etc., 45 N.J. 434, 212 A.2d 769 (1965); Ettin v. Ava Truck Leasing, Inc., 53 N.J. 483, 251 A.2d 278 (1969). Recovery is based on considerations of policy rather than actionable conduct by the defendant."

In *Schipper v. Levitt & Sons, Inc., supra,* the Court cautioned that:

> "The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . .
>
> • • •

> "The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation."

Lest doubt remain, the courts specifically held in *Totten v. Gruzen*, 52 N.J. 202, 245 A.2d 1 (S. Ct. 1968).

> "We see no good reason why the negligence principles adopted in *Schipper* with respect to mass housing developers . . . should not be applied to all builders and contractors and we now so hold."

The law aside, the holding below actually does no more than hold the general contractor to the framework which his contract with subcontractors laid out. Essentially, the contract required sub-contractors to have insurance, as well as sub-contractors, in stated amounts. The fact that the job site was wholly unpoliced by the general contractor or his agents in respect to this "required" insurance is itself quite probably negligence since no one other than persons in and about the job site could have been beneficiaries of the insurance requirement. Had the contractual framework obtained, and the general contractor most probably intended it should, full coverage would have, in any event, existed.

In the legislative field, there has been enacted both a Construction Safety Act, *N.J.S.A.* 34:15-166, *et seq.*, and and a Workers Health and Safety Act, *N.J.S.A.* 34:6A-1. As here pertinent, the ultimate responsibility for enforcing the safety provisions of the Code is in the general contractor who must, in effect, police the job site so that the safety provisions are carried out. N.J.A.C. 12:180-3.15.1.

In sum, the decision below does no more than carry out a policy of state law announced some 19 years ago and confirmed in every reported decision since. At the practical level, the decision does no more than carry out the scheme which the contractor himself undertook to create, via the contract with subcontractors.

Point II

The majority below properly set aside the narrow and incorrect decision of the District Judge.

The District Judge clearly conceived that his function was a limited one in the premises and that unless he could "distinctly glean from New Jersey law and policy," the particular course pointed out by the unanimous decision in *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, *supra*, then he would be able to fashion any remedy at all (P.C. pg. 9a).

Such, of course, is not the function of a Federal Judge called upon to divine state law. Rather, the court's function is the broader one of predicting what a New Jersey court would do if confronted with similar facts where there is no decision "squarely on point" (P.C. pg. 21a). See particularly note 5, at P.D., pg. 21a.

While the Petitioner rather grandly asserts that "the Third Circuit apparently [sic] is the only judicial circuit which undertakes an independent review of District Court decisions on issues of state law," the cosmetic citations which follow clearly do not support this proposition.

Where, as here, there is a precise and unanimous statement by the Supreme Court indicating what it would do in hypothetical premises, it would seem clear that only the bravest of state trial Judges would simply ignore that decision and proceed in a direction opposite from that

pointed out by the State Supreme Court. Particularly is this so when, as noted, all subsequent decisions have reaffirmed the doctrine of distributive justice as one of policy in New Jersey.

One observation would here be appropriate. Petitioner's Memorandum seems, for some reason, to differentiate between plaintiffs who are "uncompensated" and plaintiffs who are "compensated." Reference here is to workmen's compensation. Apparently overlooked is the fact that the Workmen's Compensation Statute itself recognizes a right in the injured workman to bring a so-called third party suit and a significant number of the products liability cases which have arisen in New Jersey directly involve workmen who received workmen's compensation and then brought suit against the manufacturer or distributor of a machine, vehicle or other agency of harm. See *N.J.S.A.* 34:15-40 and citations therein.

Given clear guidance by the Supreme Court 19 years ago, it would not be appropriate to respond to the Petitioner's *ad hominem* plea, as it appears dominantly in the second point.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari inasmuch as decisional law in the State of New Jersey is both clear and wholly supportive of the decision of the majority below.

Respectfully submitted,

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By: /s/ Edward B. Meredith
EDWARD B. MEREDITH